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No. I.

A TREATISE of the COURT of STAR CHAMBER*

PART THE FIRST.

§. I. THE DIVISION OF THE TREATISE.

I CANNOT but with admiration reverence the grave judgment of the sages of the common law of England who have been abstinent in publishing their meditations and arguments in their professions, either holding it as a flag of vain-glory unworthy their gravity, or as one of Lyncurgus' maxims, or their ancestors' Druides' prescripts, *mandare memoriæ, et disciplinæ potius quàm scriptis*; unlike to this cracking age, when all men in all professions *quicquid subito crepant omnino à flatu Aollinis credunt*; who, for fear of burying their talent, post to the press to publish to others that which they well understand not themselves; it being assuredly no matter of necessity to publish the rea-

* A MS. copy of this Treatise, Harl. MSS. No. 1226. contains the following memorandum :

" This Treatise was compiled by William Hudson, of Gray's Inn, esq.
" one very much practised, and of great experience in the Star Chamber,
" and my very affectionate friend. His son and heir, Mr. Christopher
" Hudson (whose hand-writing this book is), after his father's death,
" gave it to me 19 Dec. 1635.

" JO. FINCH,"

Ch. Just. C. P. 11. Car. 1.

Ld. Keep. Gr. Seal, 15. Car. 1.

Lord Mansfield quotes this MS. in the Case of the King v. Wilkes, (4. Burrow 254.) and states the passage relating to the power of the king's attorney general, which is hereafter pointed out in PART III. §. 4.

PART I.

sons of the judgment of the law, or *apices* or *fisiones juris* to the multitude, who are apt to furnish themselves with shifts to cloak their wickedness, rather than to gain understanding to further the government of the Commonwealth: for surely few men would be ruined by dishonest means, if men knew not how to cover their dishonesty under some colour of law or justice; a kind of ignorance for which an old historiographer commended the Scythians, affirming, that *plus apud illos profuit ignorantia quam apud Græcos divinarum atque humanarum rerum scientia*. But, amongst that which is written of the common laws of England, I find little mention made either in the reports or treatises of the law concerning the great and high Court of Star Chamber, except now and then (*sparsim*) some one or two cases in an age; mentioned rather, as it seemeth, to manifest to posterity that there was such a court, than to enlighten the world with the radiant beams of those bright shining stars, as the cynosure to steer and direct a sure course of the happy government of this state in peace and glory. Only sir *Thomas Smyth*, in his "*Commonwealth*," hath glanced by it; and mr. *Lambert*, the great antiquary of this time, hath taken great pains to set forth the lawful power, authority, and jurisdiction of this court; and mr. *Crompton* hath collected many particular cases there properly examinable.

BUT by reason that I conceive mr. *Lambert* hath erred in some things, and the rest are defective in that which is most material, I will, by the help of Almighty God, endeavour, with as much brevity as I can, to set forth, as in a model, the composition and jurisdiction of that high court, so far forth as, by my weak observations and labours for the space of twenty years, I could attain unto. And to this end and purpose, that I may more plainly express myself, I will divide the Treatise into Three several and distinct Parts.

A TREATISE OF THE COURT OF STAR CHAMBER.

1. THE First shall be concerning the court itself; the PART I.
judges, officers, and ministers thereof.

2. THE Second, concerning the jurisdiction of the same, and the causes which are there handled and properly determinable.

3. THE Third, and last, concerning the course of the same court; in what form causes are proceeded in, and there determined.

THE last whereof I should be more bold to enlarge upon, for that no man heretofore hath ever taken any pains or regard to make observation of the same more than for his own private use and particular practice.

§. II. THE COURT OF STAR CHAMBER IS A SETTLED ORDINARY COURT OF JUSTICE.

AND in the FIRST PART of this TREATISE concerning the Court of Star Chamber, I will content myself to handle, amongst other things which might fully be debated, these heads: First, That it is an ordinary court of justice. Secondly, The name of the court. Thirdly, The antiquity thereof. Fourthly, The dignity thereof. Fifthly, The presence thereof. Sixthly, The officers thereof.

AND concerning the first point, I shall meet with two several contentions.

1. THE one is, that this court is but an usurpation of monarchy upon the common law of England, and in prejudice of the liberties granted to the subject by the Great Charter, especially where persons are produced, without legal prosecution to punishment, at the bar without oath or testimony.

2. THE other, that it is no settled ordinary court of judicature, but only an assembly for a consultation at the king's command, upon some urgent occasions, in cases where all other courts want power for want of law to warrant them, or have no weight sufficient to poise the question.

A TREATISE OF THE COURT OF STAR CHAMBER.

CONCERNING the first, I well remember that *mr. Carew, Pasch. 1. Jacobi*, being produced *ore tenus* for an audacious part in shutting up his parish-church-door, denying the Common Prayer to be used according to the form established in the reign of queen Elizabeth, did, at his defence of the crime, deliver into court that part of *Magna Charta*, *Nullus liber homo capiatur vel imprisonetur aut disseisetur de libero tenemento suo vel de libertatibus vel liberis consuetudinibus suis, vel ut ligetur vel exaleter aut aliquo modo distruatur, nec super eum ibimus nec super eum mittemus nisi per legale iudicium parium suorum, vel per legem terræ.* But the grave lord keeper *Egerton*, well weighing, that it was not only necessary to proceed to the censure of the gentleman at that time, but to give satisfaction to the world that the proceedings in that kind were just and legal, did learnedly declare the true meaning of that law, shewing the disjunctive *per legale iudicium parium suorum*, which was by indictment, or some writ original, *vel per legem terræ.*

AND that the law of England had always as well an extraordinary and expeditious court to conserve the peace of the kingdom, as an ordinary form of prosecution, where the bleeding state required not speedy remedy; and for the course of calling men to answer to a suggestion in that court by privy seal or *subpæna*, and proceeding thereupon in the antient form; *mr. Keeble, in temp. H. 7.* in his reading upon this law plainly declareth, that a privy seal is in the nature of an original writ, and so that course of proceeding not dissonant from the act of parliament.

THESE judicial opinions, both of antient and modern times, together with the continual usage in the reign of all the kings of this land in succession; and that the king, who is the fountain of all justice, must necessarily, by the law, have power to execute justice himself, which he doth most properly in this court; as shall be hereafter declared at large; shall be sufficient to satisfy

Part I.
 satisfy every indifferent man concerning the first point, that this court hath not encroached upon the common law, or any way opposeth the liberties of the Great Charter.

FOR the second point, I would fain know what there wanteth in this court to decypher it to be an ordinary court of judicature which any other court at Westminster hath? It hath judges, ordinary p^{ro}cess, officers, a place certain, a continued session in the term time, and day given over from time to time. So you shall find it in the reign of *H. 7.* and *H. 8.* as well as now and then more continual without days of intermission, whereas now the court sitteth ordinarily but two days in the week, the same then sitting, for the most part, every day of the week.

BUT it is objected, that the usual courts of justice do only sit in the term time, and this court sitteth at the king's pleasure, as well in vacation as term; for so it did at Davison's sentence in the reign of queen Elizabeth, and in the great Dutch cause in the reign of our now sovereign; which manifesteth it to subsist rather by extraordinary sovereignty than ordinary course. To this I answer, that the extraordinary prerogative which that court hath, taketh not away the ordinary stability; for the chancellor of England may determine cases in the court of chancery in the vacation time as well as in the term. And the chancellor and lord keeper have ever so done; yet no man will deny the court of chancery to be an ordinary court of justice.

AGAIN, It is objected, that the pleadings in the court and the records thereof are not tied unto any such formality, or preserved with so much care, nor entered upon any adjournment and continuance with so much strictness and diligence, as other courts at Westminster; and therefore it seemeth, that this great court hath rather been as a committee for such great causes as it pleased the king than as a court of ordinary justice, which is ever tied to form, as to the chief principle which giveth it being.

PART I. Whereunto I give this answer: That there is no court in Westminster-hall which doth so sharply correct the neglect of convenient form in him which complaineth, as this court, thereby to put sufficient certainty to the matter fit for the judgment of this court, discharging the parties with costs double to expence. But the gravity of this court contemneth to give allowance to every cavillation, and that upon great and good grounds; for it would but protract and delay him which complaineth, and protect him that is an offender, by which the Commonwealth should receive prejudice; for *interest rei publice ne delicta manant impunita*. and therefore the lord chancellor Egerton, with great wisdom, denied to give allowance to the frivolous exceptions to bills at the hearing, as injurious to the subject and prejudicial to the state; of which I shall more fitly speak hereafter.

BUT for the custody of records, howsoever in these latter times they may be neglected, for that some great men have delivered their opinions that it were no great matter whether any pleading remained or not after the cause heard, because the judgment cannot be reversed by error; and causes have, upon deliberation, been ordered to proceed to hearing upon copies, the original being withdrawn by neglect, and no care taken to have them engrossed *de novo*, and orderly filed: so also the very sentences by which severe punishment hath been executed upon offenders have, by mere neglect, been wholly left unentered; so that there is no record to justify the inflicting of that punishment: howsoever, I say, this negligence hath crept into the court of very late time, either in Mr. Mills's age, or since the office hath been executed by many deputies, one being thrust out by that time he understandeth the duties of the place, and another put in altogether unexperienced; yet in former times the judgments before the king and his council were kept in such care, and remain in such order, as no records of
the

the kingdom are of more use than those remaining in the Tower of London; many particulars of which I shall have occasion to remember hereafter.

AND for the continuances, whosoever will be pleased to look over the records of the reigns of king *H. 7.* and *H. 8.* they shall find all the rules and orders there entered in Latin, and the continuances of cases entered from term to term, sometimes with a clause of assent of the parties, sometimes *per ordinem cancellarii*. And in those times matters of shallest moment were observed with a great deal of state; as, that the appearance was recorded before the lord chancellor and president of the council; sometimes in the chancellor's house, sometimes in the parliament chamber, sometimes in the inner star chamber, sometimes in the court; all which gave majesty to the court and terror to the offenders. It is now descended to so mean a step as that the appearance is taken only by an inferior clerk, and not so much as by the deputy clerk of the court: a gross error, and first used by mr. Mills in his age, by reason the other hath part of the fee, and is since carried as a particular office, and executed by an inferior clerk, wherein there is no observation of state or majesty worthy of the dignity of that great high court.

BESIDES, one great inconvenience thereby ensueth, for that in great offences the offender *flagrante crimine* is stricken with amazement, and then coming before a grave and reverend person, truth is easily won from him, which after the party be hardened will never be gained. And this I have observed upon perusal of the records of *H. 7.* to have been before the then lord chancellor, as it is to be seen in one *Maylin's* case about the 11th of *H. 7.* and thereupon the party was bound to appear *de die in diem*, or confess the offence; and that this court hath had a certain place or residence in *Camera Stellata*, than which no court of England can be more ascertained in place. And this shall suffice in this short

A TREATISE OF THE COURT OF STAR CHAMBER.

PART I. discourse to manifest that the Court of Star Chamber, although an high court, yet it is an ordinary court of justice in this kingdom.

§ III. THE NAME OF THE COURT.

HAVING now named *Camera Stellata*, methinks that I should begin as *Plutarch* does his "*Romulus*," *magnum illud Romæ nomen à quo inditum, &c.*; and so it hath been a great and large question, Whence this name Star Chamber had its original? Some think it is so called of *Crimen Stellionatus*, because it handleth such things and cases as are strange and unusual: some of *Stallen*. I confess I am in that point a Platonist in opinion, that *nomina naturâ sunt potius quam vagâ impositione*; for assuredly Adam, before his Fall, was abundantly skilful in the nature of all things; so that when God brought him all things to name, he gave them names befitting their natures. And so I doubt not but *Camera Stellata* (for so I find it called in our antient Year-books) is most aptly named; not because the Star Chamber, where the court is kept, is so adorned with stars gilded, as some would have it; for surely the chamber is so adorned, because it is the seal of that court, *et denominatio being à præstantiori magis dignum trahit ad se minus*; and it was so fitly called, because the stars have no light but what is cast upon them from the sun by reflection, being his representative body; and as his majesty himself was pleased to say, when he sat there in his royal person, representation must needs cease when the person is present. So in the presence of his great majesty, the which is the sun of honour and glory, the shining of those stars is put out, they not having any power to pronounce any sentence in this court, for the judgment is the king's only; but by way of advice they deliver their opinions, which his wisdom alloweth or disalloweth, encreaseth or moderateth, at his royal pleasure: which was performed by his most excellent

excellent majesty with more than Solomon's wisdom in that great cause of the *countess of Exeter* against *sir Thomas Dake*; where his majesty, during the dignity of that court, sat five continual days in a chair of state elevated above the table about which his lords sat; and after that long and patient hearing, and the opinions particularly given of his great council, he pronounced a sentence more accurately eloquent, judiciously grave, and honourably just, to the satisfaction of all the hearers, and of all the lovers of justice, than all the records extant in this kingdom can declare to have been, at any former time, done by any of his royal progenitors. To conclude then, I suppose the name to be given according to the nature of the judges thereof, which I hope agreeth with the name of the chancery and other courts of this kingdom.

§. IV. THE ANTIQUITY OF THE COURT.

I COULD very well take occasion to enlarge my discourse into a greater volume, to set forth the antiquity of this Court of Star Chamber; but so many men have taken pains in this kind, that I may spare much labour and travail therein. There is no man will deny, that in all monarchies the king is the fountain of all justice, to whom is the first refuge of those that are distressed, and the last to whom appeals are to be made. And *Bracton*, father of our laws, who writ in the time of *H. 3.* doth agree it to be the law of England, *Rex et non alius debet judicare, si solus ad id sufficere possit, cum ad hoc per virtutem sacram tenetur; exercere igitur debet rex potestatem juris, sicut Dei vicarius, et minister in terrâ.* But, as he saith, *si dominus rex ad singulas causas determinandas non sufficiat, ut levior sit illi labor, in plures personas partito onere, eligere debet viros sapientes et Deum timentes.* And *Britton*, who writ

PART I. in *E. 1.* beginneth his treatise to the same purpose, and concludeth (writing in the king's name), "We will, that
 "our own jurisdiction be above all jurisdictions, in all cases
 "real and personal."

ADMITTING then the king to be supreme judge of
 all, and sitting in his throne of majesty with his wise
 men and sages, distributing justice in his royal person,
 or by his council; and that, finding himself and them
 overcharged, he hath therefore committed the pleas of
 the crown to certain judges, matters of common right
 betwixt party and party to other justices; and to others
 his revenue; all which, before they were distributed to
 others, were properly determinable before himself and his
 council; it must then follow, that all courts of justice
 have flowed out of this court, as out of a fountain; the
 king and the council having distributed these causes to
 substantial judges for the ease of the subjects and them-
 selves; and then this court must be the most antient court
 of justice, and the mother court of this kingdom: which
 is the more plainly manifested, for that almost in man's me-
 mory the court of requests was instituted by the reference
 of poor people, and of the king's servants, out of this
 court, whereby a great part of interest betwixt party and
 party ceased there to be prosecuted. But to prove by
 judicial acts and records this court is most antient as it is
 now established, I mean in the same manner, place, and
 all circumstances, and not founded by act of parliament
 in the reign of king *H. 7.*; a doating which no man that
 had looked upon the records of the court would have
 lighted upon, it being solemnly adjudged by the chief
 judges of England, sir Edward Coke and the lord Howard,
 attended by the king's learned counsel, then sir Francis
 Bacon and sir Henry Yelverton, in the cause betwixt the
earl of Northumberland and sir *Stephen Proctor*, and pub-
 lished in open court, that the stat. 3. *H. 7.* extended not
 any way to this court, but that the lords authorised by
 that act may at all times, in all places, determine of the
 matters

PART I.

matters therein specified; for manifestation whereof it appeareth plainly in our books of common law, when courts of justice are antiently divided into base courts and the king's courts, the base court is hallimott, or court baron, leet, hundred court, and sheriffs tourn; the king's court was only a superior court of justice, whither, by reason of the ministry or the weightiness of the cause, suits were exhibited to the king in person. And long before the Norman Conqueror king Edgar made a law, that no man should seek to the king unless he could not find right at home; and the like law was afterward confirmed by Canute; which proveth expressly, that antiently, before the Conquest, the king and his council determined weighty causes and grievances of the kingdom: and no man will doubt but that the Norman Conqueror and his son, being become absolute monarchs by the sword, would maintain that judgment seat, and, as it is evident, pressed the people so far with the weight of royal prerogative (which is in nothing so much exercised as in the sole, sovereign, and arbitrary administration of justice, which made the people cry out so much for the restitution of Edward's laws), by which some courts of justice were established, all things being then done, judged, and ordered by the will of the sovereign, as well in civil as in criminal causes. But it is more apparent in Henry the Second's time this great court of the king was established; for Gervasius Tilburienſis, who dedicated certain Dialogues of the Obſtruction of the Exchequer to Henry the Second, hath these words, as mr. Lambert remembereth: *Nulli licet statuta ſaccarii infringere vel quavis temeritate reſiſtere; habet hoc enim quiddam commune cum ipſa domini regis curia in qua ipſe in propria perſonâ jura dicit, &c.* And of what court can this be intended, other than of this great court, I cannot imagine; it being his royal ſeat of juſtice appropriate to his perſon. And in the time of the ſaid king H. 2. *Glanvill*, in his preface, doth plainly deſcribe this court. Having ſpoken of the cuſtomary

PART I. • toinary laws, he addeth thus: *Quod laudabilius est, talium virorum (licet subditorum) Rex noster non dedignatur consilio, quos morum gravitate, peritiâ juris et regni consuetudinibus, suæ sapientiæ et eloquentiæ prærogativa, aliis novit præcellere, et ad causas mediante justitiâ decidendas et lites dirimendas, nunc severius, nunc mitius agendâ, prout viderint expedire, ipsis r. r. r. a. g. n. a. n. t. i. s. c. o. m. p. e. r. i. t. c. u. m. r. a. t. i. o. n. e. p. r. o. m. p. t. i. s. s. i. m. o.;* which cannot be intended of any court but this; for the courts of the common law cannot slack or strengthen the reins of justice, but are tied to a strict performance of law by their oath. To descend down to *Edward 1.* the English law-giver and settler of that free charter, in what place or court do we conceive that just king called his judges and officers to that great account, and set those heavy fines upon them, and removed them, so that he left only one great judge remaining unsentenced as a man of integrity? And in the eighteenth year of his reign an act of parliament was made, that the chancellor and justices of the bench should follow the king wheresoever he went, to the end he might always have at hand learned and able men to advise him in such cases as he admitted to his hearing: and what was this but *coram rege et concilio*? I will not labour much in *Edw. 2.* the times being unfit to make a precedent. But *Edw. 3.*'s time is plentiful of apparent matter, declaring the establishing this court; for by the statute 15. *E. 2. c. 4.* and 2. *E. 3. c. 31.* it is prohibited, that no man shall be put to answer before the king or his council without presentment before his justices due process, matter of record, or writ original, according to the antient laws; by which it is plain, that men were then put to answer before the king and his council without such lawful process; which surely was the apprehension of the body by pursuing, and so detaining him from answer for the same before the king: And 40. *E. 3.* the king received the complaint of Elizabeth, wife of Nicholas Studley, and thereupon caused James Studley to appear before his chancellor,

cellor, treasurer, justices, and other sages, assembled in *la chambre de estioles pris de la receipt* at Westminster, being the place where the court is now kept. So that it is apparent that these statutes did not extinguish the power of the court, but the abuse of apprehending mens' persons to answer suggestions; not unlike to process of good behaviour which issueth out of the crown-office, where the articles upon which it is granted rest in secret; the accused party being never called to answer, or given to understand for what reason the process issueth; and many times he lieth in prison for want of sureties till he wasteth his whole estate: as great a grief in our age as the other was in the reign of E. 3.; and, as I have formerly declared, the writ of privy seal is to that purpose an original writ. And I must not omit the declaration of the three *corams* in the twenty-eighth statute of Hen. 5. where *coram nobis et consilio* is resolved to be *coram rege in camera*, which hath been so often affirmed by the reverend judge sir Edward Coke.

IN the time of R. 2. it appeareth, that this court continued the wonted prosecution; for by the stat. 27. R. 2. c. 6. *the chancellor* hath power alone, by his discretion, to award damages against any person that should make any untrue suggestion against any other before the king and his council, and had not power to assess damage before that act; for that if they had not, the king and his council have no power at this time: but we know that our royal king gave 3000l. damages to the countess of Exeter for a slander, and that most justly. And the law of R. 2. did only give power to the chancellor alone, that the grieved party might have the more speedy relief from one than from many: by which, it may be noted, the commons seemed to give allowance to this kind of prosecution, although they had in those ill-governed times opposed the very writs now used in this court called *quibusdam certis de causis*, both in 1. R. 2. and 13. yet the king still upheld

PART I. upheld his regality, sovereignty, and prerogative of judicature.

HENRY 4. obtaining by a popular applause the crown of England, the people thought it a fit time to depress the kingly authority; and therefore in the parliament 4. H. 4. the commons complained that they were unquieted by the writs of *subpœna* and letters of privy seal, and prayed that the party accused might be received to traverse such surmises, and to try them by an inquest; which if they found for him, they might give damages with regard of his slander and costs; and that the accuser might make fine and ransom, and suffer imprisonment. The wise king, knowing how far it trenched to his royal prerogative, answered, that he would give order to his officers to stay the frequency of those writs; but not yet so that they could not send for them in cases necessary, as formerly had been used; for if that course could have been restrained, the common laws had, by the abuse of officers, and corruption of sheriffs and jurors, before this time been utterly quashed and overthrown, or else the Commonwealth utterly ruined: for when a corrupt jury had given an injurious verdict, if there had been no remedy but to attaint them by another jury, the wronged party would have had small remedy, as it is manifested by common experience, no jury having for many years attainted a former. As also at this day in the Principality of Wales, if a man of good alliance have a cause to be tried, although many sharp laws have been made for favourable panels, yet it is impossible to have a jury which will find against him, be the cause never so plain: or if arraigned for murder he shall hardly be convicted, although the fear of punishment of this court carrieth some awful respect over them. Good reason then had the kings of this land not to be intreated to part with this jewel, although it hath been sought in all times of advantage.

To go forward, the noble king H. 5. did, before him and his council, determine a cause between *William Goddard*

Goddard and his wife, plaintiffs, against *Hugh Stranle*, for the tithes of the manor of Serlox and St. Lawrence, in the isle of Thanet, in the county of Kent; for the hearing whereof he sequestered the profits until the right were tried, as well for the avoiding of the breach of the peace, as waste to be committed during the controversy.

BUT in the reign of *H. 6.* the judgments were frequent in the court; for *Danvers* was there purged of the rasure of a record by these words, *in camerâ stellatâ consilio regis*, and he which did raze it sentenced for the same. And *Ralph lord Cromwell* was attempted to be slain by one *Talboys*, and a multitude of others, sitting in council in the Star Chamber at Westminster; and in 31. *H. 6.* the same *Ralph lord Cromwell* was there acquitted for accusation of suspicion of treason made against him by one *Colson*, a priest. And myself have had in my custody a *subpœna*, bearing test in *H. 6.*'s time, directed to the constable of Dover castle, to cause a portman to appear before the king and his council at Westminster; which *subpœna* I delivered to the lord chancellor *Egerton*, who caused it to be delivered to the process-maker of this court, commanding him to make all *subpœnas* against portmen in that form, which ever since hath been performed accordingly.

AND after *H. 6.*'s successor, being *E. 4.* being assisted with his council, heard the cause of *master and poor brethren of the hospital of St. Leonard's in York* against *sir Hugh Hastings, Wormerdel, and Others*, for a thrave of corn of every ploughland in Yorkshire, Cumberland, Westmoreland, and Lancashire; for the which they, being very poor, were not able to sue at the common law; or rather, for that the suits would have been infinite. And another like was heard before the king and his council for the *abbot of Bury St. Edmund's* against one *Trixtam* and others of that town, for turbulent election of the aldermen, where they had no corporation nor head but the abbot: and it
appear-

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appeareth by the report of *Huffey, Ch. Just.* 1. *H.* 7. that *E.* 4. sat in the Star Chamber in conference with his lords, and took their oaths for execution of divers laws, which, as he saith, he saw when he was attorney to king *E.* 4.

AND although *R.* 3. reigned but a short time, yet it appeareth in our Year-books that he sat twice in person in the Star Chamber; the one time to hear the cause of the Spanish merchant; and the other, to be resolved by the judges of three questions, which he there propounded unto them. But the English Solomon, *H.* 7. as well before the stat. 3. *H.* 7. 1. as long after, kept it as an established court of settled justice, and there in person himself deliberated of great matters; as of the intercourse of Burgundy, the marriage of prince Arthur, and the like: and many causes concerning titles of land were there determined, possession orderly established upon shewing their evidence, and security always taken for keeping the peace: and about the tenth, eleventh and twelfth years of that king these cases were more often heard before the president of the council than before the chancellor, treasurer, or privy seal; whereby it is most manifest, by the subsequent as by the precedent practice, that the court then sat not by virtue of that statute, the president of that council not being mentioned therein, but sat as they antiently had done, and by as antient, if not more antient, authority than any court in Westminster-hall.

FOR the ensuing times of the reign of *H.* 8. *E.* 6. queen Mary, and queen Elizabeth, there is no doubt of the existence of this court, nor of the great use the state made thereof. The first began with *Empson's* fall, who was first blasted in this court; and the last ended with the late renowned earl of *Essex*, who received from thence the overture of his ruin.

THUS I have, as I conceive, made the antiquity of this court most plainly appear in all ages by authority as well as reasons; so that no man can doubt but that it is an ordinary court of judicature.

§. V. OF THE DIGNITY OF THIS COURT.

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ORDER requireth that I should now speak of the dignity of this court; of which to treat as I ought, I shall want the pen of a ready writer, depth of judgment, and the fluent words of a good orator. But yet this I dare say, that since the great Roman senate, so famous to all ages and nations, as that they might be called *jure mirum orbis*, there hath no court come so near them in state, honour, and judicature, as this; the judges of this court being surely in honour state and majesty, learning understanding justice piety and mercy, equal, and in many exceeding the Roman senate, by so much, by how much Christian knowledge exceedeth human learning: and surely the causes there handled were of the same nature with those that are handled in this court.

LET me give an example for one: *Statius Oppianicus*, a rich citizen of Rome, was accused by *Aulus Cluentius*, his kinsman, for many murders, and poisoning of many of his allies, by whose death he gained a mass of wealth; and so far the cause was prosecuted, as that *Cluentius* obtained a judgment against him. *Oppianicus* had no way to escape this punishment but to accuse *Aulus Cluentius* before the senate to have obtained the judgment by corruption. The state of the information against *Cluentius*, repeated by *Cicero* who made his defence, was, *corrupisse dicitur Aulus Cluentius judicium pecuniâ quâ Statium Oppianicum innocentem injustè condemnaret.*

LET me parallel this with one in our time. *Sir Anthony Ashley* was accused for a murder. His accusers prosecuted him by indictment at the common law: he fled to this court to stop the current of their malice; and he complained that divers persons, some out of malice, some out of covetousness, and some to relieve their necessities, had conspired together falsely and unjustly to ac-

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cuse him of this fact, to beg his estate of his majesty to themselves; and thereupon obtained a stay of the prosecution against him, and proved his accusation against *ſir James Greton* and others; whereby his innocency and their falſhood, by the wiſdom of this high court, was diſcovered, and his life and eſtate protected by this high and ſovereign juſtice.

ONLY theſe differences I obſerve: That in that popular ſtate an appeal was allowed to *Oppianicus*, after he was convicted of theſe horrible crimes, which would never have been allowed in our ſtate of monarchy; for if *ſir Anthony Aſhley* had ſtayed his complaint till his trial had been paſſed, and judgment had been given, upon the falſe accusation of theſe conſpirators, ſuch reverence is given to a judgment at law, that this court would not have examined whether it be obtained by corruption or conſpiracy, but by reaſon of the imminent peril did, in this caſe, (which is rarely done) ſtay the proceedings upon the indictment till the caſe in this court were heard and determined: an happy juſtice to a gentleman, who otherwiſe had aſſuredly periſhed, and his eſtate had been utterly ruined.

ANOTHER difference is, that the appellant in the one was the apparent delinquent, in ours the party oppreſſed; and their appeal was to delay juſtice, and ours was to protect innocency; ſo that in the event we far exceeded them.

THE laſt difference is this: That our ſtate hath always wanted a *Cicero* or *Hortenfius* to make a defence for ſuch as are here accuſed. But there cannot be denied that there is no bar of pleading which yieldeth ſo large a ſcope to exerciſe a good orator, as that court; the uſual ſubject being the defence of honour and honeſty. But the grave chancellor *Elleſmere*, affecting matter rather than affectation of words, tied the ſame to laconical brevity; an honour to the court of juſtice, to be ſwayed rather by ponderous reaſons than fluent and deceitful ſpeeches.

LET

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• LET me ascend a little higher, to deliver my opinion without offence, That the judgments given by great counsel (as this court is) being without doubt replete with justice, are of greater terror and amazement to offenders, than more severe punishment given by any inferior judges; which I suppose is signified in the Gospel, where it is said, that *he who calleth his brother Raca shall be in danger of the council.* And the same is exceedingly manifested in the judgments of this court: for whenas the severity of the law was executed upon those which in duels and single combats slew one another, and divers did justly receive the pains of death as wilful murderers for such attempts in cold blood, and upon premeditation and appointment; yet did the same little good to stay the raging of the pestilence in this Commonwealth, whereby many noble and brave spirits have been taken from their country before their due time; until this court by sharp, grave, and awful sentences, called in former times in the records of this court *fulminantes*, applied a sovereign remedy to this spreading malady, by which in short time that plague is utterly extinguished in this kingdom.

AND so likewise the grave archbishops and bishops, finding the heresy of the *Erasmites* to creep into this kingdom, held it the surest way for suppression to bring it to this bar; where the bishop of Winchester's confutation, London's sharp reprehension, the archbishop's wholesome discipline, together with the grave judicial medicines, stopped the current of those flowing streams which would have been like to have brought an inundation upon Christ's church and people.

• IT is not the last honour and dignity to this court, that the sentences and judgments of the same are not the opinions of one private person, but the judgments of many noble, wise, and learned men joined together; so that it is a tropic rule for assurance of truth, *quod pluribus et sapientibus videtur*; and therefore latter times have yielded some dangerous precedents, when the state of the cause complained of to the court had been by the lord chancellor referred

PART I. to some one man, making himself judge of the whole cause, which no man alone ought to be judge of, no not the chancellor himself. It is true, that in former times causes were usually referred to judges and divers of the presence, to end and determine by consent of parties if they could, or otherwise to certify to the court. But the orders have been of late times drawn up, *that as the committee shall certify, it is ordered that it shall so be*; so that no special matter is ever left to the judgment of the court: an insufferable indignity to that great court, worthy to be redressed by him that sitteth at the stern; for by that means the great integrity of this court, which is so universally applauded, it being impossible to be corrupted by reason the judges are so many, is utterly deluded; and one man, by this device, is made judge of the whole cause, which is most prejudicial. The committee for the most part being a judge of the inferior courts, doth willingly lessen the growth of this high court, as being desirous to uphold his own proper jurisdiction.

But let me be conceived, that in some cases the king's counsel or the judges are properly and solely to judge; that is, when demurrer or plea is put into the court by a defendant to the form or to the matter of the bill; which being matter of law hath ever been referred to their judgment; except the plea and the demurrer be to the jurisdiction of the court, then it is most fit to be decided in open court. So likewise, if one defendant answer interrogatories insufficiently, or in any case which tendeth not to the determination of the cause, the judges and the king's counsel are solely to judge; and it behoveth the court to give credit and countenance to their judgment; their labour is only *ex officio*, without fees or rewards.

But lest the former usual references of determining of causes by judges should mislead the ensuing times, let it be observed, that these usual references were when this court held plea of matters of interest betwixt party and party, where the one party was too mighty, or
else

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else poor and not able to sue; or one or both popular, and so subject to raise a faction, and sometimes a tumult or an uproar; in which cases references of determination were very necessary. But in crimes fit to be made examples, the Commonwealth hath an interest, which is the great subject of this court; in which cases the former precedents will give no warrant to make the like references.

BUT this tetter, which hath almost spread itself over the face of this great court, hath made me digress a little: I will return to another manifestation of the dignity of the court; which is, that the proceedings thereof are *tam lento pede*, without precipitation, in giving time to the defendant to defend or excuse himself, both in producing the testimony and in making defence at the bar; and that it taketh hold in judgment only of direct proofs, speaking circumstances, or more than probable presumptions; and these not single but double, which causeth the judgment thereof to be esteemed worthily, like the laws of the Medes and Persians, irrevocable. Besides, the reasons of the sentence being succinctly collected and knit together, and sagely delivered by grave, learned, and noble personages, whose very countenances add weight to their words, and tying themselves to certain and not to conjectural proofs, I have known many offenders, though judged to severe punishment, have with alacrity submitted themselves, and with cheerfulness undergone it. And not long since, in the case of one *Scarlet*, of *Shropshire*, against divers persons for embezzling of the evidences of his brother newly slain, all the parts of the cause were so sifted by the wisdom of the court, that one of the offenders being at the bar was so well contented with the justice of the sentence, that he willingly submitted himself thereunto; affirming, that though the fact were done with such secrecy as he thought could not be discovered, yet the lords in their sentence did so by circumstances track them truly, as if they had looked upon them. Where I cannot omit to extol that worthy course of binding the delinquent to appear at the hearing

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of the matter, if the matter be confessed, or any vehement suspicions appear against him; at which time, although his counsel be heard, yet is he allowed to apply any thing by them omitted, or move compassion by his submission or penitence, which seldom goeth from that bar unrewarded; and there he receiveth satisfaction of the just proceedings against him, and the compunction many times of his sin; and the world and people that see him are much moved then to hatred of his offence, and terrified by his example of punishment, as it is pronounced, he there standing before their eyes; yea, the court is oftentimes moved to become suitors to the king for mercy, he having committed unto them his justice, reserving his mercy unto himself; which perhaps they would not do, if a spectacle of sorrow did not stand before them.

LET this then suffice for the dignity of the court, that in the same, it matcheth with the highest that ever was in the world; in justice, it is, and hath been ever, free from the suspicion of injury and corruption; in the execution of justice, it is the true servant of the Commonwealth; and whatsoever it takes in hand to reform, it bringeth to perfection. And therefore it is well called *Schola Reipublicæ*, the discipline whereof doth not only enter all the other courts of justice and ministers thereof, but all the subjects of the kingdom.

§. VI. OF THE JUDGES OF THIS COURT.

IT followeth that I should, in the next place, speak of the presence of this court; that is, the judges thereof; the great senators of this state. And because I have already glanced upon this question, Whether the treasurer, chancellor, or privy seal, or any of them, be the only judges of this court, and all the rest but assistants? yet those judges can-
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not proceed without they call their assistants; for then it is error, as the case of 8. *H. 7. c. 13*. It is fit that I leave it charged, that the court, after the making of that statute, did usually determine causes when neither treasurer, chancellor, nor privy seal were present; but sometimes the president of the council alone, and sometimes assisted by others of the council, above forty times in the 12. and 13. of *H. 7*. And sometimes, when neither the treasurer, president, chancellor, nor privy seal were present, other lords of the council sat for the determining causes; which proveth that they are all judges of the court. And yet I shall hereafter shew, that the lord chancellor or lord keeper, (for their places, by act of parliament, are all one) hath divers privileges of sovereignty belonging unto him, as the supreme judge of that court, which surely doth belong in his absence to him which holdeth the supreme place in that council.

But first, by reason that the appearance of every party is said to be *coram rege et concilio*, it is fit that it be shewed what that council is before whom that appearance is to be made; for in the antient laws of England we read of three councils; common council, *magnum concilium*, et *privatum concilium*. For the first, in all our writs founded upon any ancient statute law, the writ beginneth, *Cum per commune concilium regni nostri provisum est*, by which it plainly appeareth that *commune concilium* is the assembly of the lords spiritual and temporal and the commons of parliament; and there is *magnum concilium Angliæ*. It appears by the statute of 37. *E. 3. c. 18*. that false informers shall be brought before the chancellor, treasurer, and great council, to find surety to endure *pœnam talionis*, if their suggestions were false. And all the statutes made after that act of 37. *E. 3.* as well of *R. 2.* of complaints before the council of the king, as of 13. *H. 4. c. 7.* for certifying riot to the king and his council, which is the court of Star Chamber, afterwards by express name called

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the king's council in the Star Chamber, 19. *H. 7. c. 18.* in the stat. 33. *H. 8. c. 1.* for false tokens, 4. *et 5. Ph. et Mar.* for secret contracting with young maidens, and divers subsequent acts of parliament. The third, which is *privatum concilium*, or the council of state mentioned in the act of Eliz. it hath been questioned whether it were all one with the great council. Surely there is none of the privy council but is also of the great council; but there are some of the great council which are not of the privy council. Mr. Lambert remembereth an ancient record in *E. 1.*'s time, that *Henry lord Beaumont*, for some unreverend speeches to the king, was commanded out of the council-house: it is said he was *juratus de magno et secreto concilio regis*; which implieth some kind of difference between *privatum et magnum concilium*. And I well remember I was of counsel in a cause where the bill prayed process against the defendant to appear before the king and his privy council; to which a demurrer was put in. The same being referred to a judge, *sir Thomas Coventry*, then of counsel with the defendant, defended the demurrer; and the same was overruled against me, as not being the proper return of the process in this court. Now, that every peer of the realm which is a lord of the parliament is *de magna concilio*, it appeareth partly by the writ by which they are called to the dignity, wherein is contained that the king desireth their conference *circa ardua negotia regni concilium suum impensare*, but especially for that they have used to sit and give their judgments in this high court as judges in the same, and that most usually and commonly until about the 30. *Eliz.*: and myself have heard a great lord, yet living, claim his right of sitting there in open court; to whom the lord chancellor *Ellesmere* gave this answer, that he knew not whether it were his master's pleasure that that question should be determined that day; but some other of the presence maintained that the

the baron's right; which seemeth to be agreeable with justice; for it is undoubted that *Henry earl of Lincoln* and the *lord Grey*, and divers others which were not of the council of state, were present, and sat and gave judgment when *mr. Davison* was sentenced. And how they were competent judges unsworn, if not by their native right, I cannot understand; for surely the calling of them in that case was not made legitimate by any act of parliament; neither without their right were they more apt to be judges than any other inferior person in the kingdom; and yet I doubt not but that it resteth in the king's pleasure to restrain any man from that table, as well as he may any of his council from the board.

BUT not to digress from the matter, and to proceed with the judges of this court in order, there is no doubt but that the lord chancellor, or the lord keeper of the great seal, is the supreme judge and director of this high court; and to manifest the same, there are many sundry badges of honour and privileges of pre-eminence as belonging and incident to that high place. But lest I should be too tedious, I shall only observe their ceremonies and rites of honour every day remarkable in this place, and three denotations of his priority of place in the manner of public hearing causes in the court, and five essential parts of sovereignty or judicature of the court.

THE first ceremony is, that all the great dukes, marquisses, earls, barons, and council of state of the kingdom, attend the hour and occasion of this great lord's going to sit in the high court; a great motive to him of vigilance, and that which maketh his sloth or neglect subject to the more censure. It is therefore worthy of observation of that memorable *lord Ellesmere*, that in twenty years service he never caused the lords which attended that court to stay past their wonted hour, but for the most part came into the inner chamber long before them, and bestowed his time in giving orders for matters of course to the clerks, which was a great ease and ex-
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petition to the subject, and very beneficial to the clerks which attended him; and those few times he was absent *causa ægritudinis* he always gave sufficient notice, lest they should attend him.

THE next ceremony is, that his ensigns of honour, his mace and seal, are carried before him in the court; and so is no other lord's of that presence; yea and his servants have the favour to attend him within the court, though many young noblemen are compelled many times to seek their places elsewhere.

THE last great ceremony of honour is, that whereas any other lord of the presence speaketh not in that court unless his head be uncovered, the lord chancellor or lord keeper speaketh always with his head covered, as a person to whom all the others bear a kind of respect or reverence.

THE notes of superiority observable in the form of hearing of causes are, first, that he calleth or directeth the counsellors which shall speak at the bar; which hitherto was with much more solemnity; for that the lord chancellor, being careful that the court should not be troubled either with silly or ignorant barristers, or such as were idle and full of words, and not careful of the truth of their informations, partly to the end that the worthiest men of that profession should be known to the presence, and partly that their causes by their industry should be made perspicuous, did upon the admitting of the suit, and the appearance of the party defendant, appoint such as should be of counsel, being men of sincerity and experience; which assuredly was a great mean for the discovery of truth in many causes; a grave lawyer holding it a part of his duty, *ut si quaeretur verum non inficitur*. But latter times have rather introduced favourites or kinsmen as subjects for the judge's favour; an error surely in great men, and a scandal to so high a seat of honour, where the suspicion of any inclination to partiality should be avoided as a dishonour to the majesty thereof, and any countenance to unworthiness as a badge of infirmity.

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I REMEMBER that I have observed that grave chancellor whom I so often mention, but never without honour and reverence to his name and memory, when out of some respect he hath called to hear a man which he favoured, to stir himself often upon his seat as in some perplexity, for fear of some error the speaker should commit in his speech, supposing that his favour shewed publicly to an undeserving man, was a blemish to his judgement; as, on the other side, he gloried in nothing more than to give public grace to men either of note, merit, or to towardly and hopeful young men in their industrious inceptions.

THE second public note of the lord chancellor or lord keeper's superiority in this court is, that upon all motions made in court which are not in point of sentence of some cause, he is the mouth of the court to give the rule or order. And this part requireth not only an excellent apprehension to conceive what is moved, but perfect experience in the course of that court, and an able judgement to apply the particular case to the usual course; as also this is that which trieth the integrity of his uprightness in carrying the balance even: and if in any of these that great lord shall be defective, the execution of this part of his place will suddenly discover him; for his apprehension, his only help, is, that the counsel perform their duty in a punctual and brief manner, pressing their motions to the point which they require, as they ought to do; for if they wander into vain circumlocutions or iterations, that grave judge will tie them to a point which maketh the resolution not difficult; or if it be, he useth the judges present, whose opinion he usually asketh in any difficult question in law, for his experience is quickly gained, in any of that great capacity willing to follow former times. But if any in that place be of the mind of the Lacedæmonians, to bind himself to walk in the dark without light, desiring rather to make than to follow precedents, he may happily
shew

PART I. shew much wit and learning, but shall hardly give satisfaction to the suitor; when by such innovations the counsel can never tell how to advise the client; but until experience be gained, yea and continually for his ease, those things which belong to the ordinary course are usually referred to the clerks of the court who stand by him; his judgment and uprightness must ever be brought with him, and ever accompany him as *conites inseparabiles*; for as the first maketh himself honoured and the Commonwealth blessed, so doth the other establish his seat upon earth, endeareth his memory to all posterity, and prepareth a throne for him in eternity. But if this great judge shall swerve in either of these, from that which is right and just, the rest of the presence may dissent from him, and the rule of the major part must be the order.

THE third and last note of his superiority is, that according to his own discretion he commandeth the attendance of the judges in that court; for although the chief judges do most usually attend this court (being an honour unto them), yet may the lord chancellor command any other judge at his pleasure to sit there; and that is usual, when that the cause in question is either in respect of the vicinity, circuit, trial had before him, or some reference made unto him, better known to some judge than to any other. So likewise he doth refer all matters in law, pleas or demurrers or otherwise, wherein for the most part he distributes to every judge in his circuit the causes which arise in those parts, unless for their ease he referreth them to the king's counsel, which in many cases is very necessary; and he doth many times require the presence either of the judges or some other of the lords to accompany him, when he giveth order at times not usual for the sitting of the court, whose presence is rather for splendor and magnificence, or to prevent suspicion of unequal justice, which commonly is feared in private orders, and prevented by such judicial witnesses, than any other necessity, himself

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giving the rule; which pains was often taken by the lord chancellor *Ellesmere* in the afternoons of sitting-days, to the great relief of the suitor, whose greatest burthen in this court is difficulty of hearing and dispatch: for I dare say, if the lords should sit every day, as they did in *H. 7.* and *H. 8.*'s times, and handle causes of that nature they then did, no court of this kingdom would be so replenished with causes; so confident the people are of equality and justice there.

BUT to come to the pre-eminence of this great lord in the essential parts of judicature: the first whereof is, that the direction of every cause, for the manner of the prosecution unto the hearing, and the appointing of the hearing, belongeth unto his place; so that as he hath power to dispense with the personal appearance of any man, or the continual attendance which every man is tied unto in this court, without he be admitted to attend by another, out of grace and favour, so hath he also the power to expedite or give respite to causes, according to his direction: the party grieved may fly to move in open court, where, if there be no cause, he shall have a reformation. And it is to be observed, that whatsoever the clerk of the court now doth as belonging to his office in the prosecution of causes, the same is merely the office of this great lord, and in former times wholly performed by the court; I mean the lord chancellor, president of the council, or any other great lord in their stead. But the causes of equity in chancery growing many, and other employments of special service pressing the principal officers, the clerk of the court, hath of latter times been trusted with the direction of these things of course; where if the suitor be wronged, he principally seeketh redress from the lord chancellor or lord keeper's power to appoint the time for hearing of every cause; a matter for which he hath great suit made unto him; which maketh his justice much more eminent, if the same be carried with indifferency: for if
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PART I. he appoint a case to be heard, and then displace the same again, and prefer another, he doth utterly undo the suitor, who travelleth to attend his cause, retains his counsel, and perhaps is never able to do it again; and it perplexeth the counsel which attend the bar, that they know not in what case to appear themselves. Great care therefore ought to be taken to set down such causes as are fitting for the dignity of the court; and that after such cases are preferred which the king's counsel requireth or the court ordaineth; an equal hand to be held to set down such as have long time expended, and being once set down not to displace them without great reason.

FOR the particular parts of the lord chancellor's power in the prosecution of causes, I shall, when I come to treat of the course of the court, in order come unto them; only methinks that an objection might be made unto me, that I seem to contradict myself, when I say that this great judge hath power in directing and ordering all causes till they come to sentence, and yet blame the reference of causes for the whole matter to the judges; especially when it is assured that many vexatious suits are there exhibited, and many frivolous bills put in, for matter unfit for the dignity of that court, of which it is the duty of that supreme judge to ease the subject and the court, I must needs say, that it is a great mischief, if there should be no means to cut off vexatious and frivolous suits, and offences of the highest nature, and of the most eminent persons, are smothered and concealed. But if ancient course might prevail, all would be redressed: for if the question be for want of form, the committee or lord chancellor may justly determine it: but if the merit of the cause be in question, then the special matter ought to be reported, and the report read in open court, where the counsel for the other party may be heard openly; and that taketh away all possibility of grievance, and restoreth the court to their ancient splendor.

THUS far I have shewed this great judge's power in all cases until the sentence; I shall now shew his prerogative

rogative in the sentence: for in all other courts at Westminster, where there are four judges, if their opinions be equally divided, two one way and two another, there is no judgment entered; for which reason our renowned sovereign added a fifth judge to either court, for the subject's ease and expedition to bring his suit to a conclusion; but in this court, if the preference be equally divided, the lord chancellor or lord keeper's voice swayeth it one way or the other; for if he condemn or fine the defendant or plaintiff, then hath it ever been undoubted, for that in things indifferent the best for the king's profit is to be taken; but where his voice in equality acquitteth, yet the pre-eminency of his judgment weigheth down the king's profit, and the person shall stand acquitted. For so *Stephen Proctor* was acquitted by the voice of that most judicious chancellor *Ellesmere*; and so resolved by the judges upon reference made unto them, and their opinions, after deliberate hearing and view of former precedents, published in open court.

BUT if I should be asked how this sovereignty grew, I can give no other estimate but the directions which were left during the minority of *H. 6.*; in which there was an article, "That if the opinions of the lords *Bedford* or *Gloucester* fell to be in equal voice, that party on which either of them is, shall be held the more party," as in the thirteenth article of these directions is contained; which being settled in them, who were then the principal of the council, hath ever since, as it seemeth, rested in the prime person of the court: and therefore in all the old decrees it is said, that it is decreed by the right reverend the lord chancellor and the other lords. For so in the 13. *H. 6.* in the case of *Tillesley* and *Marrish*, it is said to be decreed by the right reverend *John cardinal archbishop of Canterbury*, chancellor of England; and others of the council. And in *Hill. J. II. 8.* the warden of the Mint is said to come into the court before the right reverend *William*, by God's grace, arch-
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bishop of Canterbury and lord chancellor of England; and the lords, after the sentence of the cause, which needs must bring *præmium et pœnam* in the punishment of the offender, the court hath the whole power: but in recompensing the grieved party in all causes, the power is only in the supreme judge; for damages are given but in some special cases, but costs in all, except the court express that there shall be no costs. And these costs are taxed only according to the direction of the lord chancellor without controul, so always as that the course of the court be pursued, and costs given to no person but to whom they are due; for if the lord chancellor will grant costs to any person who by course of the court ought to have none, the court will discharge those upon motion. As not long since costs were granted to *sir Thomas Wentworth* against *doctor Thornbury*, lord bishop of Worcester, in a cause where *sir Thomas* was discharged, and divers other joint defendants with him were sentenced, at the said lord bishop's prosecution; but the bishop's counsel moving the court, and shewing that where any of the defendants were sentenced so that the plaintiff ought to have his costs, and have costs paid him which were improper to one and the same cause, upon that motion the costs were discharged: but if the costs be too great or too little (so that there be just cause of taxing any), the court never encreaseth or mitigateth, much less dischargeth, but the same is in the sole power of this supreme judge; he may refer the same to consideration, either to be mitigated or discharged, as he shall think fit.

BUT a question hath been stirred in this point concerning this supreme judge's power: Whether he may apportion the payment of costs? or if costs be granted to be paid by divers, Whether he may appoint all or part to be paid by one, and the residue by the rest? And it seemeth it doth not lye in his power; for when costs be once taxed to be paid by one to divers, then surely, by antient course, the party to whom the costs are taxed hath election to

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take the whole costs of which person he pleaseth; which privilege ought not to be taken from him, for the party who prayeth the same hath a writ of contribution against the rest for their proportionable parts; yet it is alledged on the other side, that since the great judge hath power to discharge or mitigate costs at his own will, by like reason he hath rather power to proportion the payments.

AND surely once lord *Ellesmere*, in the case of one *Wellesden* (although at all times a most strict observer of the course of the court), did so proportion the payment of costs; but it were better not done, for any thing out of course can never be void of clamour.

AND whereas it is supposed that the power of taxation of costs came first to be attributed to the lord chancellor by the statute 17. R. 2. by which he had sole power to give damages upon false suggestions, and that costs are involved in the word damages, it is plain that the same is utterly mistaken; for then he should have power in this court to give the grieved party damages: but that is not in his sole power, but the act of the whole court; wherein they are not very frequent, lest men should be too much discouraged to exhibit their complaints, and so many great offences passed over in silence.

AFTER sentence, and the party's satisfaction by costs, there resteth the execution by punishment, in which this great judge hath sovereign and great power; for out of the prerogative of his place he may either hasten or delay the punishment: and where the offender is committed during the pleasure of the court, or ordered to be bound to his good behaviour during the pleasure of the court, the principal judge may determine that pleasure and will, and may discharge the party; but where one is committed by the court till he hath paid money or performed some other thing, before his performance he ought not to be discharged by the supreme judge; for the rule is general, that the public orders taken up by the court ought not to be frustrated, or be made

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THE last great prerogative of his eminency and superiority in this court is, that the king directeth his letters, or his privy seal, declaring his pleasure in all things to be done in this court, to this great judge; of which kind many be extant upon record; as one of *H. 7.* to dispense with the appearance of one *sir Walter Griffith*, who attended the king in his progress to Exeter, and was bound by a recognizance to appear in this court, that day should be given till his majesty's return; which is directed in this sort, *viz.* "To the
"right reverend father in God and our right trusty and
"well beloved the Cardinal the Archbishop of Canterbury,
"primate and metropolitan of All England, and our chancellor of the same;" and another in *6. H. 8.* to discharge one *Bellis*, who was sued there for supporting two of his servants in an indictment of felony, for that the matter was confessed by another upon his execution: and this was directed to the most reverend father in God our right trusty and entirely beloved the *Archbishop of Canterbury*, primate of All England; in like manner to our chancellor *Verulam*, by privy seal from his most excellent majesty, in the cause of *sir Thomas Lake*. And likewise the honour belonging unto this great judge, as his majesty's principal prolocutor, to publish and make known his majesty's pleasure to the judges and justices of peace at all times at his appointment, which is usually the last sitting of every Term; and sometimes upon extraordinary occasions and accidents any sitting day, wherein is required as much learning and eloquence as ever was of any orator in the Roman senate.

I HAVE omitted one branch of this sovereignty, in giving orders upon petitions of suitors made unto him alone, and to none other of the presence; which by reason of the great abuse thereof in latter times I intended to have omitted; but, weighing with myself the necessity to
relieve

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relieve the subject many times when the court is employed in weighty causes, that counsel cannot be heard, and the compassion which so great a judge oweth to the poor and distressed, I cannot dissuade the use of the same, considering that the hearkening unto them is a work of mercy, piety, and an imitation of the Supreme Judge: *offendunt nunquam thura precesque fovem.* Yet I would not have the same be made a market for the profit of his followers, nor be received in all cases, but only in demanding things of grace and course, which may be done without hearing of the other side; for if any were required of any other nature, the lord chancellor *Ellesmere* would answer that petition, "I make no such orders upon private petitions;" with this caution and apposite rule, that if any false suggestion be contained in the petition, the order obtained upon it shall be void; or if any thing done in open court, to the contrary of that which is thereby required, be concealed, then the order upon petition is not to bind the other side; which courses being strictly held, much ease and small grievance would come by petitions, but only prejudice to those which attend the bar, which so great a judge may supply by more often hearing, than upon sitting-days, than of late times is accustomed.

AND thus much shall suffice to have been spoken of the superior judge of the court: it now remaineth to speak of all the residue of the same.

AND first, as concerning the great and eminent officers of the kingdom, the lord treasurer, privy seal, and president of the council, their places or voices in this court, when the superior sitteth, are of no more weight than any other of the table; so that the displeasure of a great officer cannot much amaze any suitor, knowing it is but one opinion; and the court is not alone replenished with noble dukes, marquises, earls, and barons, which surely ought to be frequented with great presence of them, but also with reverend archbishops and prelates, grave counsellors of state, just and learned judges, with a composition for justice,

PART I. tice, mercy, religion, policy and government, that it may be well and truly said, that *Mercy and Truth are met together, Righteousness and Peace have kissed each other.* The number in the reigns of *H. 7.* and *H. 8.* have been well near to forty; at some one time thirty; in the reign of queen *Elizabeth* oftentimes, but now much lessened since the barons and earls, not being privy councillors, have forborne their attendance. And the court was in the reigns of *H. 7.* and *H. 8.* most commonly frequented by seven or eight bishops and prelates every sitting-day; in which times let me without offence observe, that the fines trenched not to the destruction of the offender's estate and utter ruin of him and his posterity, as now they do, but to his correction and amendment, the Clergy's song being of mercy. And I well remember that the most reverend *archbishop Whitgift* did ever constantly maintain the liberty of the Free Charter, that men ought to be fined *salvo contentamento*; and in many years never gave any sentence, but therein he did mitigate in something rhetorical to adorn his speech: but the slavish speech of whispering was not heard to come from the noble spirit of those times in that honourable presence, and not familiarly introduced there, till a great man of the common law, and otherwise a worthy justice, forgot his place of session, and brought in this place too much in use. Yet surely in those days the benefit to the crown was equal to these times, if not greater; for either the greatness caused the same to be begged by some courtiers or laboured to be pardoned, or, being set *in terrorem*, brought to so low mitigation, or, for want of the delinquent's ability, by necessity installed, as that much more would be levied to the crown, if they were imposed with more moderation; and many more offences which are committed would come to punishment, if the greatness of the fine did not cause the delinquents to seek their peace by composition; so that the king loseth his fine and the Commonwealth example.

§. VII. OF THE OFFICERS OF THIS COURT.

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THE officers of the court yet remain to be spoken of, which time hath encreased as much as the offices themselves; for whereas in times past there were no other officers but *the clerk of the court*, and *the usher* of the same, there are now four *attornies*, or *secondary clerks* also, to take care of the indifferent managing of causes, and preparing the same with equality for hearing of the court; and there is also a *process maker*, which writeth all processes which issue out of this court, and passeth the broad seal of England.

I SHALL first treat of *the clerk of the court*, who is the principal officer attending this court, and is the first clerk of the council in place, being so created by the Heralds at queen *Elizabeth* passing through the city of London to St. Paul's in the year 1588, to give Almighty God thanks for the conquest of the Spanish king's navy; who was assuredly first ordained by the queen to make true entry of the rules, orders, and decrees of the court, and to keep the same orderly, as also all other records of the court; and to certify the copies to be true under his hand, and to make entry upon all appearances upon processes or recognizances: I say, to make the entry of the appearances; for the appearance was ever made before the chancellor, or some of the council, and most commonly in the court, where, in the clerk's absence, the usher sometimes took the entry of it, and caused the entry afterwards to be made; as in the clerk's book of appearances of record in the time of *H. 7.* doth appear. In which respect I have before observed a little boldness of these times, to appoint an inferior clerk to perform that, which the clerk of the court could not do but in presence of some of the council, and therefore fit to be done by the deputy clerk at the least. But of latter times the clerk of

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the court doth appoint also the *examiners* to take also the examinations of all the defendants and all the witnesses which are examined in court; and if the lord chancellor did give the favour to answer by commission (which he hath power to do without controul), the clerk of the court did demand a fee of 6s. 8d. of every man which had that grace given to him. "But that encroachment was abridged by the lord keeper *Egerton*; and I have much marvelled that the ordaining and appointing of examiners of that court is not likewise reserved to the power of the principal judge, it being without doubt belonging unto him.

In the time of *H. 7.* the clerk of the court took no examinations, but the lord chancellor, or other principal judge, did appoint who should take the examinations in every cause; as sometimes the counsel of *prince Arthur*, sometimes one of the presence, sometimes one of the masters in the chancery, and sometimes some other eminent man; and, no doubt, if the chancellor had power to appoint who shall take the examinations in every cause, the appointment of the examiner of right belongeth to him, and the words of the patent to the clerk of the court cannot carry away the right of the place. Besides, I have in my custody some antient collections of the officers of the court, collected long before my time; by which it appears the clerk of the court, within these forty years, compounded with the lord chancellor for the appointment of those places, there being by right, without doubt, a part of the copies due unto him as keeper of the records. And surely it were to be wished that these places again might be restored to their proper owners, that the same by a reverend and just judge might be bestowed upon men of great integrity, for that it lieth in the power of the examiners to acquit the offender, and condemn the innocent; yea, and to perplex the court by uncertain testimonies, or tire them with frivolous discourse, if that officer be either corrupt or ignorant; and being granted to the principal clerk he cannot execute it himself,

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himself, but either appointeth or setteth the place to those who will give most; whereas an able and honest man may well deserve the benefit of the place, there being now allowed unto him but 3d. a sheet for every sheet of paper in which he taketh the examination, the rest going to the clerk of the court; and if he were appointed by the lord chancellor he could have but 6d. for the one half must belong to the clerk of the court, as keeper of the records; by colour of which place of examiner, the clerk of the court demandeth the fee of 4s. 4d. for every defendant's admission to attorney, which is the mere power and favour of the chancellor, as shall be shewed hereafter.

• SURE it is that the king always appointed who should have the charge of the records; but *II. 6.* in the twenty-second year of his reign, granted the same by the name of *Clericum Consilii* to one *John Keut*, doctor of the law, who was afterwards in the time of *H. 7.* sworn of the council, and one *John Bladeswell* appointed in his place; so that he held not both places as clerk and judge together, as hath been done in latter times. And in the sixth year of the same king, *Robert Ryder* was made clerk, as shall appear hereafter; in *1. H. 8.* *John Valentine*; and *22. H. 8.* upon a surrender thereof, the same was granted to *Richard* and *Thomas Eden*; and in *5. E. 5.* granted in reversion to *Thomas March*, to whom it fell in *9. Eliz.* and then was granted in reversion to *master Mills*, who came to it in possession about of *Eliz.* and after it was granted in reversion to the learned and eloquent judge the chancellor *St. Alban*; and after him to others; and by surrender to that worthy gentleman *sir Humphrey May*, chancellor of the Dutchy, and to *mr. Morley* jointly, who now execute the same by deputy. But I do conceive, that howsoever latter grants may enable the clerk to appoint examiners, of which notwithstanding I am very doubtful, yet I am sure that in former grants the king granted the office *cum omnibus vadiis, proficuis,*

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• I WILL now proceed with the office of the clerk, which is now executed by an able and sufficient deputy sworn for the execution thereof, and allowed by the court, and must always be, he being of great use and trust to the lord chancellor.

• BUT I know not *quo jure* the clerk of the court hath of late erected divers and sundry officers; as one to make warrant for all processes, record the appearances, and receive, keep, and deliver all certificates made to the court; another to keep all records of bills and pleadings, examinations and commissions, both of the defendants and witnesses; the third is the *register*, who draweth all the orders, sentences, and decrees of the court, and all bonds of recognizance; a fourth to enter all the rules of all affidavits

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decrees and orders from the clerk of the court. For the first, I have already spoken how unfitly appearances are taken by any but by the clerk, much less warrants to be made for process by any other; being in antient time wholly awarded by the lord chancellor or the court, and a great mission to the clerk to do it. But for any man to have the custody of the records being unsworn (which is the chief cause why the clerk of the court hath his fee), I know not how by law or reason it is warranted; for either they must say that they supply the place of deputies, and so ought to be sworn, or otherwise it is a great oversight to commit the same unto them; or else they must execute those places as the deputy's clerks, and then they cannot demand any fee to themselves, but the clerk's sole and antient fee. And I fear this multiplying of officers will, in short time, be complained of as a great grievance for increase of fees; and in the mean time the records are negligently kept, and many times lost.

THE other two, which upon the matter are both registered, and therefore sworn clerks, the one for the decrees of open court, the other for ordinary course, but the first hath always been a person allowed by the court as one of great trust, who otherwise may utterly pervert the justice and honour of the court: for surely in the execution of this part of the clerk's office consisteth the sovereignty of the place; for he is trusted to collect the voices of the lords, and to enter the sentence faithfully, and none of the presence (no not the lord chancellor) can or may alter the same. And therefore, whereas I said before, that it was a note of sovereignty that the king's privy seal was ever directed to the chancellor for all things to be done in the court, so likewise it is a great prerogative to the clerk of the court, that for altering or disannulling the decrees entered in court, the king hath directed his privy seal to the clerk of his council. So you shall find that *H. 8.* did in the 17th year of his reign, direct his privy

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privy seal to his trusty and well beloved servant *mr. Robert Ryder*, clerk of his council, by which he was commanded to annull a decree of that court against the mayor and city of Canterbury; whereby it is manifested that the trust of them is wholly committed unto him; and therefore his clerk, called the register, is always allowed by the lord chancellor also, as one which may poison his justice; and, being allowed by him and sworn, may not upon every wilful conceit be removed; as it appeareth in the case of one yet living who was register, and *mr. Mills* was enforced to yield good reason to the court for his removal.

I SHALL not need to set down the fees belonging to the clerk of the court, for they were fixed in the court, in a table, and so they ought to remain; only an antient fee of 2s. for putting or subscribing his name to copies, is taken from him by reason of *mr. Mills's* moderate use thereof, which were fit to be considered of. But his fee which he hath yearly from his majesty is about 26l. 13s. 4d. Besides, he hath his scarlet robes at the times of coronation, and such like; and one great honour is, that he is always admitted to sit at the lords table, at dinner, in the inner Star Chamber, for there the lords have usually had diet at his majesty's charge; for howsoever it were for a time omitted, yet surely it was happily renewed; it being a means of dispatch of much business, which, for the sparing of a little money, was disappointed. And this shall suffice to speak of the principal officer, called the *Clerk of the Council*, and those which are now his dependents. The next are the *attornies* in order.

It is sure (as I have said before) that at the common law every man was to attend his own suit in the king's court, and other inferior courts also, in person, but when he had power *ad attornat. faciend.* And first the statute of Merton gave power to make attornies in every court; and

and the statute of Westminster second gave power to make attornies general to those which had lands in several counties; the statute of Gloucester gave power to make attornies in all cases but appeals; but by the statute of Fines it is ordained, that no judge should receive an attorney but only of pleas in that court. But there is a proviso for the power of the lord chancellor and chief justice, to whom (as it appeareth) there was always power to admit attornies; and they were not at the first so frequently obtained, but in a short time they were as fast restrained; for in 4. H. 4. c. 18. it was ordained, that the number of attornies should be restrained, and that they should be sworn. And surely in the time of H. 7. every great man in this court made divers attornies by the licence of the lord chancellor; and every man which had appeared and answered and was examined, was licensed to depart; and his attorney being by him, or any friend or person for him named and allowed by the lord chancellor, did attend for him, and the command delivered to the attorney did bind the party, which is called his admitting to attorney; which at the first was entered in this manner, (*viz.*) *A. B. licentiam habet comparere per attornatum cujus factum promittit se ratum et gratum habiturum:* and afterwards the entry was, *Licentia recedere per dominum cancellarium et compares per attorn. A. D. et dedit fidem se ratum habiturum:* but of latter times *posit loco suæ A. B. tam ad perdendum quàm ad lucrandum:* all which is done of grace for the ease of the subject, and by the lord chancellor of the court.

So that whether the clause of the statute *de Finibus et Attorn.* or by the use that belongeth unto this place, to give them licence to appear by attorney, the place of the attorney is in the gift and power of the lord chancellor: and it is sure that the persons were appointed by the lord chancellor, as namely, one *Valentine*, who afterwards surrendered to

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mr. Eden, about 20. *H. 8.* was allowed attorney there by the lord chancellor; but *mr. Eden* growing to be clerk of the court, claimed the gift of the attorney's place, and would have displaced *mr. Mills*, the father of him who was clerk of the council; but he was rebuked by the lord chancellor, the cardinal, for presuming to displace those who are placed by the court. Besides, the necessity of the duty to the client requireth the office not to be in the gift of the clerk; for the clerk, being inclined to make his own profit, if the attorney come in by him, will expect that the attorney shall serve his turn, and so the client shall be preyed upon; and have no direction to ease him: therefore assuredly the gift of the place, as well by usage as by right, belongeth to the lord chancellor and lord keeper.

THE duty of the attorney is to look that the cause be duly prosecuted to the hearing without advantage; and if he be pressed by any rule or order that may prejudice him in his cause, to inform counsel to move the court. He is also to write all the bills, answers, and pleadings, and examinations taken in the country by commission for his client. He is also to prefer the client's cause to hearing, and at the hearing to read all the acts, evidences, and depositions in court before the lords, which are urged by counsel for his client; and after hearing to draw up a bill of costs for his lordship's taxation, and to present them; wherein if he shall exceed, he shall deserve to be much blamed.

AND for performance of his duty he is sworn before the lord chancellor: the tenor of the oath is as followeth, *viz.*
 " You shall swear that you shall well and truly, accord-
 " ing to your best discretion, execute and perform the of-
 " fice and place of an attorney, in his majesty's most ho-
 " nourable Court of Star Chamber, whereunto you are
 " now admitted, and shall bear and behave yourself justly
 " towards his majesty, and all his highness's loving subjects
 " and suitors to the same court. So help you God."

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WHICH oath in that form, howsoever, in latter times there was no form of an oath remaining there of record either for the chief clerk or for the attorney, but this drawn in the lord *Hatton's* time by the advice of the following chancellor *Egerton*, then being solicitor to queen *Elizabeth*, who caused the word *office* to be put into the oath; and this form of the oath his lordship delivered to me himself to be safely kept.

BUT I have said before, that originally there were but two attornies appointed in the court, one for the plaintiff, another for the defendant; which so continued long, and was assuredly most for the ease and dignity of the court; but afterwards there was a third attorney appointed, upon suggestion that it were fit the suitor might have election of some choice; and then there was a fourth added, which surely was most unnecessary: and very fit it were if they might be reduced to their former number, which might be done as beneficially to the supreme judge as when there are four. The fees due to the attorney is 3s. 4d. and the like fee, or commonly better, for reading books at the hearing; and also for presenting the bill of costs to the lord chancellor or lord keeper. And this fee of 3s. 4d. is always due depending the suit, although nothing be done in the cause. He hath also 6d. in every sheet of paper he copieth for his client, yielding the other 6d. to the clerk of the court for his care and charge for the custody of the records. But the clerk still desiring to draw the attorney either wholly to depend upon him, or in some sort to be appointed by him, hath endeavoured to keep the records wholly from the attorney if he displease him, that he shall not have them to be copied for the client; and groundeth himself upon an order procured by *mr. Mills*, in the lord keeper *Puckering's* time, to this effect: "that the attorney should deliver all the records of the court to the clerk of the court, as appertaining to his office, to keep;" wherein is inserted this clause penned by the clerk

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clerk for his own advantage, *the attornies not having to do with them but by his consent*; and likewise (which is to be understood) after they have copied them for their clients, which will plainly appear by their orders made by the lord keeper *Egerton*, by the advice of the chief judges; in which it was contained, that the attornies should always have liberty to make search for all such records or pleadings, as have appertained, or shall appertain to them to copy for their clients, without paying any fees to the clerk of the court for the same search, as many years past their predecessors have used; so that if attornies should be debarred of records belonging unto them to copy, although they be second copies (some records being ten times copied), it is as great a wrong unto them as their denial to pay the clerk of the court 6d for every sheet, and the sum is lately wholly usurped by the subordinate keeper of the records.

It is too much apparent this is a great spoil of the attorney's place, and consequently both dishonourable and prejudicial to the lord chancellor and lord keeper, they being his clerks. And I much marvel that they have not had the privilege of the lord chancellor's clerks, to sue and to be sued before him, being assuredly by reason belonging unto them. And the reason I conceive they have not enjoyed it, is partly for that they have been settled but of latter times, and partly for that the first attornies were men of great estates, as needed not any privilege; and those which after followed, of so weak and bad estates, as that they rather desired to be protected from paying any thing, than to have convenient justice before their most competent judge. Yet thus far did that wise and learned lord keeper *Egerton* privilege them, that if any man presumed to arrest their bodies during the time they attended their service before the lords, he committed the parties at whose suits they were detained, if they would not deliver

liver them. But this was upon *mesne* process, and not upon execution. And I must confess the reason of this privilege is something abated, since the making of the process of the court and the writing to the broad seal was taken away, which belonged unto them until a *process maker* was by letters patent appointed by queen *Elizabeth*, which is the next officer of whom I am to entreat.

BUT by what warrant or precedent of former times, unless of reason or justice, *habeas corpus* have been granted from Term to Term, and from year to year, thereby defrauding men of their just debts, I can neither understand, or desire to hear it hereafter. The officer now called *the process maker*, or *clerk of the process*, is newly erected, and hath been only enjoyed by *mr. Thomas Cotton*, who now holdeth it, and by his father before him. His duty is to write all process of *subpœna* for appearances, costs or damage, of *duces tecum* of any writings or evidences, all attachments, commissions of rebellion, and commissions for examination of defendants or witnesses, writs of privilege, *habeas corpus*, *certainari*, writs of extent, or other writs whatsoever which are returnable in this court, or issue from thence; all which he bringeth to the great seal to be sealed; and for all these he receiveth his warrant from the clerk of the court; his fees are contained within his patent. And if any question be at any time concerning the issuing of any process out of this court, the court giveth credit to his certificate made under his hand, which is an allowance of his place, and of him to be an immediate officer in the court.

THERE is another attendant on the lord chancellor, or lord keeper, which hath been heretofore one of the officers of this court, which is *the serjeant*, that carrieth the great mace before his lordship. But because his place and attendance is not bounden within the limits of this court, but followeth the lord chancellor, or lord keeper's person, wheresoever he goeth, I cannot fitly call him an officer of this

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this court; yet it is true that he did heretofore ordinarily, at the command of the lord keeper, give summons for appearance in this court: but of late times it is not used, unless the ordinary process of the court cannot draw the party to obedience; then by warrant from his lordship, or the court, he exceedeth the ordinary course of justice in making search in all places, and opening all houses as he shall suspect, to apprehend the person, to produce him to the court.

THERE followeth, in the last place, *the usher of the court*, whose duty is only to keep the place, where the court is kept, comely for so great a presence, and safe for the records which are there laid, and to attend the clerks of the court and the attornies at all times to search and lay up the records; and also to call all persons who are bound to attend the court, and if they make default it is recorded; also to make silence, and to attend the lords for all things they have need. He hath a convenient house for his habitation; and, besides his fee from his majesty, hath 1s. for the appearance of every man which appeareth in court; besides great profit for preparing convenient places for young noblemen, and men of quality, which flock thither in great abundance, when causes of weight are there heard and determined.

AND thus briefly I have passed through the First Part of this Treatise, wherein I should have spent much more time and paper, but intending only a summary observation of such things, as may be useful to any public place, and not injurious to the place, profit, or person of any other, I here conclude with this request—That my opinion concerning some matters of right may not breed offence, by supposing that I have done this out of a contentious spirit; but rather that my reasons might be observed, and those whom they may concern satisfied; which if I shall obtain; *ad summum votorum nrorum pervenisse videtur.*

FINIS PARTIS PRIMÆ.

PART

PART THE SECOND.

Of the JURISDICTION of the COURT of STAR CHAMBER.

§. I. THE DIVISION OF THE TREATISE.

BEING in the second part of this treatise to handle the jurisdiction of this high court, I must steer a course full of peril betwixt *Scylla* and *Charybdis*; for if on the one side I shall diminish the force or shorten the stretching arm of this seat of monarchy, I should incur not only the censure of gross indiscretion and folly, but also much danger of reprehension; and if on the other side I should extend the power thereof beyond the due limits, my lords the judges, and my masters the professors of the common law will easily tax me for encroaching upon the liberty of the subject, and account me not only unworthy of the name of my profession, but of the name of an Englishman; so tender is this subject of *pupilla oculi*, which will not endure touch of examination. Therefore, to avoid all offence, I will not dispute *de jure et de facto*, and declare, as briefly as I can, what matters are there usually determined. In debating thereof I should leave the discourse lame if I should not say something of the privileges of this court; and how it doth vindicate any affront by afflicting deserved punishment against any, which commit any contempt against it.

So that in the second part of this discourse I shall first declare, that the causes there handled are either public or private, and they are respectively either civil or criminal; and what civil causes are here properly determinable civilly, which are of two sorts, ordinary or extraordinary: ordinarily, the suits of the king's almoner; and extraordinarily, other great matters of interest betwixt the king and the subject, which are accompanied with conveniency to the state, as well as *meum et tuum*.

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THEN I shall shew what criminal causes are here to be handled. And in that, first, I shall shew that matters capital may be here examined, and not all capital; then causes which in strictness of law cannot be otherwise questioned, may be here examined; next, that causes of especial limitation by act of parliament are here proceeded in, and that those acts are but acts declarative, and no way giving power or authority to this court, which other courts may determine or have determined. And thus having enumerated many particular kinds of causes there usually determinable, a general conclusion may be collected what the jurisdiction of that court is, either in matter, time, or place. And, last of all, I shall shew the privilege of this court, and how the court punisheth neglect, indignity, or contempt offered unto it.

§. II. CONCERNING THE STATUTE OF 3. HEN. 7.

BUT before I enter into any particular causes here handled, this place requireth that I should speak something concerning the question before touched, Whether the statute of 3. H. 7. gave any power, strength, or confirmation to this court, as the lord St. Alban hath of late published; but contrary to the resolution of the three principal judges given in his presence in *Proctor's case*, as I have before mentioned; where it was resolved, that that statute enabled that court no more than it did any other court at Westminster-hall, but these lords might determine those matters in any place of England: neither did that statute make those lords sole judges of that court, and yet compelled them to call assistants, otherwise their proceedings were erroneous, as it is held in 8. H. 7. 13.; but the court subsisteth by antient prescription, and hath neither essence nor subsistence by that act of parliament.

AND

AND it is most sure, that it is a received opinion, that the court should meddle with no other causes than are expressed in the statute 3. H. 7. c. 7.; and I well remember that the lord chancellor *Egerton* would often tell, that in his time, when he was a student, *mr. serjeant Lovelace* put his hand to a demurrer in this court, for that the matter of the bill contained other matters than were mentioned in the statute of 3. H. 7. and *mr. Plowden*, that great lawyer, put his hand thereto first, whereupon *mr. Lovelace* easily followed. But the cause being moved in court, *mr. Lovelace*, being a young man, was called to answer the error of his antient *mr. Plowden*, who very discreetly made his excuse at the bar, that *mr. Plowden's* hand was first unto it, and that he supposed he might in any thing follow St. Augustine. And although it were then over-ruled, yet *mr. serjeant Richardson*, thirty years after, fell again upon the same rock, and was sharply rebuked for the same; for the causes mentioned in that statute are but seven in number: 1. Maintenances. 2. Giving of liveries. 3. Having retainers. 4. Imbracery. 5. Jurors receiving money. 6. Untrue demeanors of sheriffs in false returns and pannels. 7. Routs and riots. A small theme to exercise that court; where, indeed, all the principal offences here examined are not once touched; as forgery and perjury, frauds, contempts of proclamations, duels, and a multitude of others which I shall hereafter recite. But I will not dwell upon this point, seeing all that have written of this, as *mr. Lambert* and *mr. Crompton*, have made this no question; and I have formerly expressed so many reasons both of authority and cases here heard, and statutes made to restrain the power of this court, before that statute of 3. H. 7. that I hope this will never be a question in future times. I therefore refer myself to the former discourse concerning this matter in the first part of this treatise, and to that which I shall hereafter touch concerning the same.

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§. III. OF PUBLIC CAUSES IN THIS COURT.

WHEN I speak of public causes, I intend them of two sorts: first, public, as being treaties and causes with foreign states: second, public, concerning the universal or general government at home. There is no established court of justice within this kingdom which useth to intermeddle with public matters of state betwixt foreign nations and this kingdom, without particular respect to the cause in question, but this court only; it being composed, (as that eloquent lord *St. Alban* well observes) of all conditions of men, like another parliament, spiritual and temporal, nobles, and lawyers common and civil, and so fit to discern, order, and dispose of all things in the universal government; so that, without doubt, all questions of state betwixt foreign nations were heretofore handled here and debated; and when there was cause of silence and secrecy, the entry was then made, *dum sederunt secreta*. If matters were preparing and not ripe for publication, the order then was entered, that they were referred to be deliberated upon by some special lord of the council, for so it may be found in 1. *H. 7.* that to commune with ambassadors, *apud fratres prædicantes*; and in the same year the lord *Audley*, lord *Dinham*, lord *Ormond*, sir *John Fogg*, and others, were appointed to deliberate of certain policies; and when things were fit for publication, this hath ever been held the fittest place to examine the designs and intentions of them.

So was *Empson's* informing the king first manifested, here in 7. *H. 8.*; the visitation of the order of Cistercians in 12. *H. 8.*; and so here was handled and debated the treaty with Burgundy; a league with the arch-duke; marriage of prince Arthur by *H. 7.*; nay, the birth of the king's children in *H. 7.* and *H. 8.*'s time were here solemnly published; queen Mary's marriage; and in queen

Eliza-

Elizabeth's time all public occurrences: the queen of *Scots'* secret designs; the earl of *Essex's* disaster; and many such like in the time of king *James*.

AND it is usually known that the justices of assize and justices of peace at this day repair thither to hear their charge, how they shall apply themselves in the government of the Commonwealth, when they shall carry an hard hand in the execution of some laws, and when they shall *remittere habemus*. And in the reign of *H. 8.* the justices of peace in each county were commanded to come thither to take their oaths. And so did they in cardinal *Wolsey's* time, when, I suppose, they were few in number, and more eminent in account than in our days. So also did the sheriffs in every county in this kingdom.

AND in this court hath there always been the assay for the mint-master and goldsmiths of London, once or twice every year, at a certain time settled and prefixed, being the publickest service for the certainty of gold and silver in this kingdom.

HERE also is settled by precise and direct orders what is to be observed for printing of books by the company of stationers, whereby the inconveniences that might arise in the state are more strictly curbed and governed than the abuses of any other trade in the kingdom; for if any of that company transgress the rule and order which in the reign of queen *Mary* was then, by the decree of this court, settled and prescribed unto them, any that will complain, maketh oath thereof, and thereupon an attachment is awarded, and he apprehended thereupon, is committed until there be a reformation and satisfaction of the wrong; by which means long and tedious suits are avoided, and present redress ministered, and a well-established order honourably maintained. So likewise the weavers of *Newbery* and woodmongers of *London*; nay, in former times, when controversies have been betwixt some great lords and their copyhold tenants, the customs have been de-

PART II. creed by this court. So was it for *Condover and Prees*, in the county of Salop, being two great lordships, and near the borders of Wales, shortly after the principality was united to the crown of England.

AND I have often marvelled, that in settling of foreign trades the company of merchants have not pursued the same course, seeing that in *H. 7.* and *H. 8.*'s time the merchants of the Hans towns, the Florentines for Alloms, and many such other, were ordered by this court; and if there were any transgression, it were easily certified, without any such great trouble and perplexity as is now usual. But that happeneth by reason of the haughty ambition of the merchants, who desire to make themselves in their companies like a council of state. But the brightness of such government is so radiant, as it confoundeth their weak judgments, and maketh them all, like Phaeton, fall from their chair of sovereignty, and break the necks of their fortune and trade; which, if they took the helping and sovereign hands of state to uphold them, they would abide more firmly and constantly, and not be quashed with every accident: for so it may be seen with what stability the antient company of merchants adventurers and those of the Hans did with all prosperity continue, so long as they had their countenance and direction from this court. But they, not being able of themselves to uphold their government, have invented a new way of later times; that is, to charge any which crosses their trading by bill in this court, as contentions of the king's broad seal, and the authority thereby granted and established; which invention began by the undertakers of the *Tynne* under prince *Henry* against *Dumming* and other pewterers of London: and since that time they have strengthened that course by procuring of letters patent to be authorised by proclamation; and the breach of that command of sovereignty, being *inftar regis*, hath ever had its punishment in this court, as is apparent in the punishment of builders in London, duels, &c. and
before

before these, of gentlemen, which, upon proclamation made to repair into their countries at the time^s of Christmas, were punished in queen *Elizabeth's* time for breach and contempt of that proclamation. But surely if the other course were followed, all trades were more surely settled and better governed, and his majesty would be free from much clamour, which ariseth from a multitude of grants and erecting of new companies tending to monopolies; which, if the former course were observed, would either never pass, or, being passed upon such public examination, would take away all clamour from the king.

§. IV. OF CIVIL CAUSES IN THIS COURT.

I SHALL speak of private causes between party and party hereafter in their proper time and place: but because the second division of causes will more properly be handled before I descend into that confused heap of private and criminal causes, I will first handle civil causes; whereof I know men will wonder that I should offer them to be subject to this court. But there is no man, who hath at all looked into the antient records of this court, who will deny that it examined, discussed, and determined titles as well as crimes; and many times in queen *Mary's* time, as the commons for the inhabitants of Beggars-bush, 4. & 5. *Philip & Mary*; and *Brocas case*, *Pasc.* 16. *H. 8.*

I SHALL presume to express with confidence, that they have been properly determinable there in many cases, but with their bounds and limits. But first, all controversies betwixt merchant strangers and Englishmen, or strangers on both parts, were there determined; the restitution of ships and goods unlawfully taken, or deceits of merchants, There was the case between the merchants of *Waterford* and

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and fir *Thomas Twaits* in 1. *H.* 7. and many of the merchants of *Lyon* and the *Steelyard* in the times of *H.* 7. and *H.* 8. Likewise oppressed women did usually complain here for their jointures withheld from them. So was the cause of *Elizabeth Ashfield* in 1. *H.* 7. against one *Harding*, which was decreed with her. And one *Margaret Beckett* having complained in *E.* 4.'s time for the like cause, for some lands of Plumsted and Woolwich in Kent, and no cause being found to relieve her, yet complained again in 1. *H.* 7. and was enjoined perpetual silence.

ANOTHER sort of usual complaints in points of justice was for matters testamentary; of which kind there are very many examples. And king *H.* 7. heard a cause betwixt *Haughton* a sadler of London and *Barker* a goldsmith, and decreed to the plaintiff 200 marks and 40l. according to the intention of a will of one *Haughton* deceased. And in *H.* 8.'s time it was also usual, and the court gave order to have the testator's goods put in safety to be inventoried; as in *Sessions Case* in 2. *H.* 8.

BUT I conceive the reason of that to be, for that in causes testamentary which were of value, appeals were so common and so chargeable to some, as that it was necessary to use some means to stop the current.

BUT the most common examination of titles and interests was, when any differences arose betwixt corporations, and abbots and convents, and mayor and commonalty, or bailiff and burgesses, of which sort I dare undertake to shew above one hundred in the reigns of *H.* 7. and *H.* 8. or betwixt great and mighty men, where interest drew malice, and partaking, which was dangerous to the peace.

BUT I can observe this, that in all these cases the court did never take upon them to determine the right of inheritance, only took examinations of it, referring the title to be discussed by the judges, and by them reported to the court; which was continued till 5. *Elizabeth*, and then was done in the case of *King's College* in Cambridge. And

in the same year is also settled the limits of the fens of Sutton, parcel of the possessions of the bishop of Ely; and thereupon, if the title stood confessed on either part, this court made an order by mediation, or settled the possession, and directed the trial at law for the right, from the which neither party was suffered to swerve without great reason yielded to the court; which course if it were now pursued, great titles would not have five verdicts on the one side and six on the other, and the land spent before the suit ended. But, without question, if when a title were stirred, and a complaint exhibited in this court, and both parties were compelled to bring their evidences to attend some reverend judge, and he to survey the same, and to find the true state of the question, and report it unto this court, and then this court should direct what the country should enquire of, one verdict would end the greatest controversy, and more sufficient jurors should be returned, and less corruption used than now is. And thus stood the power of the court in antient times.

BUT of latter times, when tyranny and malice more aboundeth than ever it did heretofore, the court doth principally exercise itself in criminal causes; only I find that there yet remaineth a jurisdiction in civil matters not yet out of use, and that of two sorts, *viz.* ordinary and extraordinary: ordinary examination of civil causes is in the case of the king's almoners, who sue in this court for detaining of any goods of a *felo de se*, or of any deodands, although it be but of the value of twelvecence; and in this the almoner recovereth only what is detained, or the value, or something in lieu thereof, as the court shall think fit, without fine or any punishment.

AND in this court the titles of subjects who claim the goods of a *felo de se*, or deodands, by the king's charter, come usually in debate, and are determined. So 6. E. 6. was the case betwixt *Allington* and *Cox*, where a lease of *Richmond* fee, with all deodands and *catalla felonum de se*

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was granted for years by *H. 8.* and after *Edw. 6.* granted *omnia catalla ffeonum de se* to *dr. Cox* his almoner, in *augmentum elemosine tam infra libertates quam extra*, and the first lease expired, and the king made a new lease of *Richmond* fee to *Allington*, rendering rent; and this being referred to the lord *Mountague*, he held the second lease good, notwithstanding the grant of the almoner. And not much different is *sr James Hayles'* case in *1. & 2. Philip & Mary*, in *Plowden*. And in these cases the court adjudged the right for the most part strictly according to the law of the land. And therefore in *9. Eliz.* a debt due to the *felo de se* without specialty, was adjudged not to be forfeited, neither could the almoner recover any thing for it; and the reason given is, for that if it were so, the debtor should be barred of waging his law; which were dangerous, for so once a debt without specialty should always remain against a subject.

YET in the case of one *Cooke*, *4. & 5. Philip & Mary*, for the goods of one *Lewis*, a *felo de se*, where *Cooke* and *Lewis* were bound to one *Bellingham* in *40l.* which was for the debt of *Lewis*, to be paid at two several days; *Lewis*, to discharge his surety, bargained and sold twenty bees and certain cows, upon condition to save his surety harmless; and it was agreed the principal *Lewis* should have the custody of the cattle; and upon the first day of payment he failed, and before the second he killed himself, having the cattle in his possession. But the vendees seized his cattle after his death, being to them forfeited, and the almoner sued them; in which case, although the property were clearly in the bargainees, yet, because the cattle were of greater value than in truth would save the surety harmless, it was ordered, that the almoner should procure a discharge of *Bellingham's* bond, and that *Cooke* should deliver to the almoner either so many cattle as good, or the true value of them; which order swerving from the course of the law, which ought to take hold in forfeitures,

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the *lord Dyer*, a most learned and reverend man, then present, strongly opposed it; in respect whereof it were to be wished, that those cases were for the most part grounded legally, for the rules of law are more certain than those of equity.

AND that it might so be, the course hath ever been to refer these cases of interest to the judges, who certify what the law is; and thereupon the court maketh an order, wherein if there be extremity, they can and may moderate according to equity.

AND thus much I thought briefly to touch, to the end that I might manifest it, that in some cases this court hath civil jurisdiction ordinarily, without exception, to this day.

Now to shew how it determineth titles sometimes upon extraordinary occasions, which is sometimes in the king's case, sometimes in the subject's.

IN the king's case, when it pleaseth him to strengthen and fortify, or disannul, or examine the liberty of any grants or charters by him made. So was it in the strengthening of the king's grant in the case of the *Tynne*, in 8. *Jac.* and in disannulling a grant in the nature of a *scire facias*, which the king may bring in what court he pleaseth. And therefore in this late example of the charter of the city of London, where they were not criminally questioned, but caused to shew cause wherefore their charter should not be made void; neither was it the first in that nature, for 1. *H. 7.* a charter granted by *R. 3.* was in this court resumed and made void. And for examining the validity of the king's grants, the duke of Buckingham's suit in this court for the high constableness of England is a notable example, which was in the nature of a petition of right.

IN the case of a subject it is more rare, and of late time seldom or never used as the principal, but as an accessory to a crime complained of; as when a deed is adjudged forged, the wronged party hath his damages. And yet of late the court forbeareth to settle the party, which

PART II. is kept out by forgery, in quiet possession; the reason whereof I cannot judge, neither will I willingly examine; for sure I am, that in 10. H. 7.th one *Lentall* pretending title to the land of one *Boucher* by a false deed, it was decreed, that he should be put to silence from any further claim concerning that deed, and he to be punished for using it; but that punishment was respited till one witness more was examined. So then the court always puts the wronged party in peace.

BUT if a man have his possession taken from him by force, upon punishing the force the court will restore the possession. But a miserable case is lately introduced; that, if upon a trial for a title wilful perjury be committed, and a man complain of this perjury, it shall not be examinable, because, forsooth, it will prejudicate the trial of the title; as though any man's title should protect a perjured person from punishment at the king's suit. And my lords the judges who gave this opinion, if a man should prefer an indictment before them for such a perjury, it would not stay the indictment. And shall not a bill be received in the Star Chamber for perjury, as well as an indictment in the king's bench, or at an assizes? I will not say but in a particular case it may be sometimes fit, and stand with good discretion; but to make it a positive rule in this court, is a neglect of the high power of this court, and a main blow to the jurisdiction thereof, and the greatest prop to perjury that it received in this age. For observe, I beseech you, how in short time this error hath encroached into the court, and gathered strength by a little warmth from favour like a sunshine. In *Clement Cook's* case a great title lying in debate, and depending a writ of error for the same, he preferred a bill of perjury against the witnesses; there being many witnesses and circumstances as well for as against the testimony, the court forbore to give any judgment in it, but left the truth to be decided by a trial at law; *argu, &c.*

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IN *doEtor Steward's Case*, because the point of perjury was to maintain or overthrow the right in point of demurrer, it was held good by the judges. I am sorry to observe it, being a thing abhorring from their usual grants; sometimes to say it is no perjury examinable, unless it tend to the matter in issue, and so trench to the right; and sometimes to say, that if it trench to the matter of right, it is not examinable, because it forejudgeth the right; as good as to say, that no perjury shall be punished but by indictment.

BUT this dangerous case hath almost drawn me out of my way: I return to other civil causes of subjects; and amongst some others I find this a principal case, that where the offence is pardoned, the court will proceed to hearing only for the party's relief. So was it in *Read and Ledger's Case* in 7. E. 6. and there only the civil part is determined.

AND it is many times usual that deeds and wills are questioned for the validity, although there be no forgery which can appear, and the deed only is damned. So was *Brakenbury's will* in *sir John Tunstall's Case*; and *Bradling's will* about 1. Jac. where the parties witnesses were charged as publishers. But of late time there is a new invention to charge a forgery upon some persons, and to crave a *subpœna*, in the nature of a *scire facias*, against the party interested in the land, to shew cause why the deed should not be damned; making him indeed one party to the suit, as well as to the crime; a course without a warrant, except it be in the king's case; for there needeth no such curiosity to charge the purchaser with publishing the forged deed, but that *pro formâ* he may be made a party to the charge, although he be not guilty of the crime; for if the deed be damned, the lord keeper may give sentence against him, although he be not sentenced as an offender: for so did the lord *Egerton* against *mr. Coomes* in *Tunstall's Case*. And it is usual to charge the husband and wife, where the wife only is the offender and to be sentenced, and the husband named to make him a party only,

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only, thereby to make him subject to costs and damages. But I suppose in this case the party interested which is not party to the charge, cannot be compelled to pay costs for that suit which is prosecuted against others to prove them guilty of the crime, whereunto he hath not been party; but surely it standeth with good reason, that since this court hath jurisdiction of the examination of forging of wills and deeds, and of the undue contriving of them, a suit to examine the truth or falsehood of such an instrument may be as well examined civilly, as heretofore it hath been, although no person be charged with crime. And if this court would direct the trial and issue at law, both parties would find ease by it, and retainers of causes be unfurnished of much work*.

I FIND one sort of persons yet more, which solely and properly sue in this court by the lord chancellor's opinion 9. E. 4.; his reason there is, because they are not to be judged by our laws but *jure gentium*; and it continued one hundred years after, that the men of Guernsey and Jersey who were to be governed by their particular laws, did always sue and were sued in this court: and how it is drawn to the council table from a public court of justice I know not; sure I am, it is more proper the subject should appeal for justice to a public court of justice rather than to a private board, although the most honourable in the world.

§. V. OF CRIMINAL CAUSES IN THIS COURT.

BEING now to treat of criminal causes, I must begin with the highest; and therein I shall shew that all offences may be here examined and punished, if it be the king's pleasure,

* Some chasm or disarrangement has here happened in the manuscript,

as treason and murder, felony and trespass; but then are not all these offences punished as trespasses, and not capitally; for if it please the king to remit his justice, and yet not so that the world shall have notice of the offence, he may call a traitor to this bar, and take acknowledgment, and fine and ransom him.

THE examples of *Roger earl of Rutland* and other nobles in the earl of Essex's insurrection, who were so punished in this court in the time of queen *Elizabeth*, and the great earl yet living in 4. *Jac.* was proceeded against in this court with that deliberation by the king's counsel, that it was his master's pleasure to proceed against him by fine for that fact (which was treason in others), but not capitally, where he was fined 30,000l. : but by what rule that sentence was I know not, for it was *ore tenus*, and yet not upon confession. So shall we find in 16. *H. 8.* that *James Fitz Gerrard*, kneeling upon his knees, with his hands bound behind him, in his shirt, with a rope about his neck, confessed that he was consenting to the murder of one *Robert Talbot*, beseeching the king's mercy; and here it was granted. And one *Alice Hardman* prosecuted *sir John Hufsey* a privy councillor in 7. *H. 8.* for being accessary to the murder of her husband; and he was commanded to forbear sitting with the lords till the cause was heard, which is the first entry of that nature that I can find. And 16. *H. 8.* the *lord Dacres* was from hence, committed, upon his confession of his giving entertainment and respect to one *Henry Carlton*, a notorious felon. And so was the *lord Ogle* for the like offence. And one *Batty*, about 3. *H. 8.* was prosecuted by one *Banister* for the bearing out, abetting, and countenancing of one *John James*, and *Thomas James*, who had robbed *Banister*, as was supposed, and *Batty* was sentenced for this; but afterwards a felon at Tyburn confessed the fact, and thereupon *Batty* was freed of this sentence, which was done by privy seal.

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AND *Pleudall's Case* is a notable case in 4. & 5. *Philip & Mary* for concealing murder and burglary. And there are above a hundred precedents, where persons that gave countenance to felons were here questioned. And the lord cardinal 10. *H. 8.* commanded the judges in their circuits to inquire of such, as countenanced such offenders, and to yield a particular account of them at a day in this court, upon their return out of their circuit. But I observe that the court, in all these cases which trench to felony, never examined it farther than the party's confession; for in these cases *nemo tenetur prodere seipsum*, but upon voluntary confession without oath.

BUT corruption of officers, or neglect of justices of peace in their duties, in not bringing felons and offenders to punishment, or not certifying recognizances, or not granting the peace; hath had always its due examination and proofs here. And 1. *H. 8.* in *sir Robert Plinton's Case*, because riot was mixed with murder and felony, it was long debated whether the court should proceed; but resolved to proceed for the riot. And so was it in the case of *sir Richard Maxwell* in 4. & 5. *Philip & Mary*; although now, if any death ensue upon a riot, all the rioters escape by colour of questioning. It is likewise apparent, that men that have been questioned in case of perjury, have here submitted themselves to the king's mercy, and have been here fined; and so is the statute 16. *R. 2. c. 5.* So was *dr. Allan*, and so *Christopher Plummer* in 9. *H. 8.* fined 500 marks, which was ordained to be employed for the new building of those rooms which are now from the Court of Star Chamber to the bridge in the palace, and was to be paid to our *sir John Heyron*, who (as it seemeth) had the charge of that building. But in all these cases this is a court rather of mercy than of justice; for if these capital offences shall be proceeded against capitally, then must men be tried by course of indictment by their peers *per legem terræ*; neither can any

any suits be commenced of this nature but by the king, who hath power to remit the greater, which is felony; for a subject may not prefer a bill for any such offence, thereby to draw the examination of a crime that is capital.

§. VI. OF FORGERY.

AFTER the offences of treason, felony, and perjury, it in the next place followeth, that I should speak of the offence of forgery, being an antient subject of this court, punished by fine and ransom by the statute 1. H. 5. which now by the act of parliament of 5. Eliz. is, for the second offence, become felony; in which case, although forgery be here properly examinable, yet the second forgery, which is felony, may not be here examined to prepare a trial against the life of a man; as it was adjudged *Tr. 1. Jac. inter Reade and Boash* concerning the forging of the deeds of *sir Thomas Gresham's* lands, concerning which *Markham* did only suffer death upon that statute as secondly convicted of forgery, and no other man since the statute was made. Infinite are the examples of punishments inflicted upon forgeries of all sorts before the statute of 5. Eliz. and then the falsifying of any deed or writing which could be given in evidence, was here examined and punished; *Bourcher's Case*, 10. H. 7. In which case all the depositions of witnesses produced do remain entered in the Register's book *de verbo in verbum*. And I find in this case, by the court's direction and for their satisfaction, a witness was examined after hearing, and before they would give sentence.

IN 2. Eliz. one *Saxy*, was convicted for forging false testimonials under the seal of the city of Dantzic, whereby, upon trial against one *William Hudson*, his factor, he recovered 800l.; and although the forgery plainly appeared,

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and the judges were required to take order for the factor's relief, the poor factor remained in execution upon the false judgment; the judges holding the judgment given so sacred, that they would not deliver the innocent without the consent of the forger, who maliciously remained in prison himself, rather than he would deliver his wronged factor.

BUT after the statute of 5. *Eliz.* questions began to arise, what was forgery and what was not; which before the statute was never doubted: and yet the act is but an affirmative act and declarative; as was the statute of 1. *H.* 5. only made for false writings concerning lands, and no other law made before 5. *Eliz.*; and yet we see *Saxy's Case* adjudged; and 2. *Eliz.* *Apriz, Chinock*, and others sentenced for forging acquittances; and in 3. *Eliz.* one *King* also for forging an obligation: by which, and many more, it appeareth, that the law punished these offences before the statute 5. *Eliz.* and these were but affirmations of the common law. And in January 5. *Eliz.* before the statute, one *Thimbleby* was sentenced, for forging a lease, to lose his ears. So that if the offence of forgery be said to have been done against the laws and statutes of this kingdom, the offence may be punished at this day, as it was before the statute; or if it be within the statute; this court hath power to inflict the punishment of the law. But if the bill be laid upon the statute, then must the offence be proved to be within the statute, or else no sentence can be given. I shall therefore set down some Cases which have been questioned upon this statute, after the making of this statute 5. *Eliz.*

IN 9. *Eliz.* *Dyer* 264. a question was moved, Whether the putting out of a *die confessionis* in a lease for years destroyed the lease and was forgery?, and then it was adjudged that it was not; and the reason was, for that the words were idle. But in *Ball and Seabrook's Case*, 17. *Jac.* a lease made for lives *habendum from the day of the date*, and that being void because a freehold must

must vest *in instanti* by the livery, or not at all, the lessee having paid a great value for the lease, to make his lease good altered it, and made it to hold from the *day of the date hereof*; and this was held forgery within the statute. And I well remember that in the latter end of queen *Elizabeth's* reign a question was once stirred betwixt *Howarth v. Beedham* and *Love*, where a deed was made by the plaintiff's brother in XXXVI. *Eliz.* to *Beedham* and *Love*; they, to over-reach a former deed made to the plaintiff, put out the letter (I) and made it XXXV.; and held forgery within the statute, contrary to the opinion of *Crompton*, who held it no forgery if the deed were once good.

IN 12. *Eliz. Dyer* 238. *Manning's Case*, it was a question, Whether the adding of any thing to the will of a dying man, without his privity, were forgery within the statute? and then held not to be within the statute. But afterwards, about the 42. *Eliz.* in the case of one *Rocheſter*, where a man devised lands to his son *Richard* without saying more, *Richard Rocheſter* put in the words, *and to his heirs*; and it was held to be forgery within the statute; but upon the doubtfulness of the proof referred to a trial at law. But I conceive that the meaning of the book is, that it is no forgery of the whole will; for, *utile per inutile non vitiatur*. And so it was held in *sir Edward Morrice's* will, where *Rich*, his solicitor, inserted divers annuities without warrant; and yet they destroyed not the will for the residue, but it was allowed good *per sententiam Curie*.

IN 13. *Eliz. Dyer* 302. it grew a question, Whether the forging of a testament, whereby only chattels or leases for years were pretended to be devised, were forgery within the statute? for that it was clearly out of the first clause, but it is within the second clause for forging or writing any thing personal, and so often adjudged. But if a lease only of a copyhold be hereby devised, it is out of the law by the words (not being copyhold); and the other general words will not help it, because it is particularly named by way of exception.

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IN 15. *Eliz.* the famous case betwixt the lord *Cromwell* and *Taverner* for forging a customary of the manor of North Eltham, with two seals to it, which made great show of antiquity, it was doubted whether it was within this statute; and adjudged within the statute, for that it was a writing sealed, whereby the inheritance of the lord might be molested, but it was no court roll, neither did any interest pass thereby. But this court doth in these cases regard the intention rather than the fact; for in the Case of *Heynes*, at the suit of *Quarrel*, for forging some words in a copy for a customary tenement, the copy in the limitation of the estate, was insensible; and yet was *Heynes* sentenced to the pillory, for *oculus suus fuit nequam*. And in this case of *Taverner* was the writ devised by the judges to levy costs and damages according to the statute in English, which the judges would never have done if they had known there had been 100 writs of *levari facias* sued forth in former times to levy costs and damages. And in this case also was the great question, Whether the king could pardon the corporal punishment? which the queen then did, and hath been since often done. But for the costs and damages, none but the parties grieved can discharge it; but before the sentence given, the king may pardon the whole offence. And so he did in *sir Pexall Brocas's* Case, 4. *Jac.* and in *Hall's* Case, 5. *Loke's* Reports, fol. 51.; for all suits in this court are the suits of the king, which he may pardon at his pleasure; as it was in *Drywood's* Case. But being heard, and the grief appearing, the party's interest then ariseth, because *transit in rem judicatam*, and justice then must do satisfaction. So likewise have I ever conceived, that upon any such pardon pleaded the court ought to give the party grieved his costs; for the defendant's pleading of a pardon is a legal confession of the fact, whereby it appeareth, that the plaintiff had *justam causam litigandi*, and so ought to have his costs; of which matters more at large in their proper place.

BUT

' BUT of late times a great question hath grown in the Case betwixt *Sallaway* and *Walle*, upōn what lands the costs and damages should be levied; and being referred to *Bacon*, attorney general, and *Yelverton*, solicitor, they certified that it was to be levied only out of such lands as the defendant was seised of at the time of the sentence given, and that the sheriff might receive the rents of the lands formerly leased, and the issues and profits of lands not leased, but such only as arise of the nature of the soil; for the sheriff could not till and sow the land to the end to levy the same. And of latter times many questions have been stirred concerning the forging of wills; the lord *Egerton* being of opinion that the statute of wills was not only the ruin of antient families, but the nurse of forgeries, for that, by colour of making wills, men's lands were conveyed in the extremity of their sickness, when they had no power of disposing of them. And he would merrily tell a tale: That a friar coming to visit a great man in his sickness, and finding him past memory, took opportunity (according to the custom of those times) to make provision for the monastery whereof he was; and finding that the sick man could only speak some one syllable, which was for the most part "Yea" or "Nay," as an imperfect voice, forthwith took upon him to make his will; and demanding of him, Will you give such a piece of land to our House to pray for your soul? the dying man founded "Yea." Then he asked him, Will you give such land to the maintenance of lights to Our Lady? The sound was again "Yea." Whereupon he boldly asked him many such questions. The son and heir standing by, and hearing his land going away so fast by his father's word "Yea," thought fit to ask one question as well as the friar; which was, *Shall I take a cudgel and beat this friar out of the chamber?* The sick man's answer was again "Yea;" which the son quickly performed, and saved unto himself his father's lands.

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AND the lord *Egerton* absolutely controlled the opinion in *Sackville and Brown's Case*, 6. E. 6. in *Dyer*, that short notes taken from a dying man and put into the form of a will after his death, was a good devise within the statute 32. H. 8. ; and although he did not always convict persons of forgery who made wills in extremities, yet he did usually condemn the wills, as made *in extremis*, when men had no good disposing memories. And so he did by the will of *mr. Brackenbury* beforementioned, *sir Randal Brewerton's* will, and many others; which part of the sentence founded civilly rather than criminally, being a will ill made, and yet could not be said to be forged. But *Drew of Boslock* was sentenced upon the statute for forging a will, whereof he took instructions by word only, and not in writing, and put the same in form of a will, and published it after the death of the testator as his last will.

IT is evident how much that wise and worthy lord laboured to make the world understand the mischief which that act of parliament of wills brought with it, in ministering opportunity to wicked men to falsify the last wills and testaments of wealthy men ; at which time, like ravens, they fly about the dying carcase to devour his estate so soon as he is dead, when many times they durst not come near him so long as he hath good understanding. The infinite examples which happened in a short time manifest the truth hereof; and his known wisdom manifested to the last parliament may stir up another to consider of his reasons with the precedents of time; in which let me note, by the way, that in my time of observation in twenty years, I know but one deed questioned to be unduly made in time of extremity, which was controverted betwixt *Southmead* and ———; and yet it was not overthrown, although it was very suspicious.

MANY are the forgers which have been sentenced in this court which were not within this law; as ——— and *Day*, 4. & 5, *Philip & Mary*, for forging of false testimonials; and the putting of the seal of the town of *Bridge-*
water

water to a certificate of good behaviour, without the consent of the mayor and the greatest part of the aldermen, by *Harvey*, which was one of the aldermen; he was sentenced at the suit of one *Popham*, about 12. *fac.* And so the surreptitious putting of the seal of the governor of *St. Bieghers* by one of the governors without the consent of the rest, lately adjudged in *Biscoe's Case*; which, under favour, I conceived was a forgery within the statute; but yet it was not so sentenced. By all which we see the use of this court in cases of doubt: That it is sure, without scruple, either upon the statute, or, by its former ability, by common right, to yield relief to him that complaineth, and inflict due punishment upon the offender. So hath rasure also been punished in writs; as one *Sparkling*, an attorney, 1. *Eliz.*; one *Tisdale*, about 10. *fac.* at the suit of *Barrow*; and of late times *Darling*, at the suit of *Hoskins*. And likewise have there been many sentenced for inserting names in blank warrants of sheriffs, of which sort also are *coram nomina*.

§. VII. OF PERJURY.

HAVING now spoken of forgery as it is not capital, but being the first offence (the second being felony), I cannot sever her from her sister *perjury*, which I will handle in the next place; for I shall necessarily handle seven great offences (usually punished in this great court) distinctly by themselves, and the residue in my prescribed order; and these are, *forgery* (already spoken of), *perjury* (as the companion of forgery), *riot* (the excess whereof may trench to be felony), *maintenance*, *fraud*, *libelling*, and *conspiracy*.

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AND first of perjury; wherein I must first meet with that positive opinion 8. *Eliz. Dyer*, that there was no punishment for perjury before the statute of 5. *Eliz.* but against jurors only by way of attain: and I cannot but marvel that so learned and reverend men should light upon so fond an opinion, whereas I dare undertake to shew them, that the common law of England had a punishment for perjury before the Conqueror; and when a certain company of learned men, to the number of twelve, in every shire were appointed to set down their laws; which they performed accordingly, and declared the punishment for perjury, as *Rog. Hoveden* remembereth. And in the reigns of *H. 7. H. 8. queen Mary*, and the beginning of queen *Elizabeth's* reign, there was scarce one Term pretermitted but some grand inquest, or jury, was fined for acquitting felons or murderers; in which case lay no attain. In 4. *H. 8.* a jury of Abingdon sentenced; and in 18. *H. 8.* a jury of Kent was there sentenced for not indicting one *Horn*, and the party ordered to be newindicted; *Throckmorton's* jury, in 4. & 5. *Philip & Mary*; a jury of Westmoreland for acquitting one *Hulham* of felony; and *Hall* and others of a jury in Cornwall, for acquitting one *Topker*, who was sentenced upon the relation of serjeant *Brown*, one of the justices of assize; and the same day a jury of Westmoreland. And in 13. *Eliz.* a jury of Stafford, being a coroner's inquest, about the death of one *Palmer*. And the same year one *Robinson* and his fellows, of Derbyshire, for finding *ignoramus* upon an indictment for the death of one *Woodroff*. And in 22. *Eliz.* a jury was sentenced for acquitting one *Hoody* of felony, and bound over by justice *Manwood*. In 8. *H. 8.* one *Leake* was sentenced to wear papers for perjury committed in an affidavit. In 7. *H. 8.* the mayor of Newcastle was committed to the Tower for perjury in his examination. In 8. *H. 8.* one *Compter* being examined for breach of the privilege of the court in procuring one to be arrested during

during his attendance, and denying it upon proof made thereof, he was sentenced to wear papers. In 3. *Eliz.* one *Buckett* being examined in open court upon a question asked him, and his oath being afterwards disproved, was sentenced to the pillory.

ALL which (it must be agreed) were injuriously punished, contrary to the law of the land, if their opinion were true, that there was then no law to punish perjury; besides the horrible imputation which should be upon the government, that so detestable a crime as perjury should be privileged in this kingdom with impunity; the sacred bond of an oath being the only trial whereby men's lives and inheritances are determined. And yet the opinion goeth further, That by that law, if they could not of right punish it before, they could not punish it after; for the proviso of the statute is, that this court may punish perjury in such wise as they ought to do *and used to do*, which is in the copulative; so that if they ought not to do it, the usage giveth no strength, and then the punishment of such perjury as is not within the statute, is unlawful at this day: which case, because the common lawyers rely so much upon it, giveth just occasion strictly to observe what perjuries are within the statute 5. *Eliz.* c. 9. and what not.

AND for that, it is to be observed, that no person can be punished by that law except he be produced as a witness to testify in some case, or do, either by subornation or his own wilfulness, depose falsely; so that it is clear, and hath been often resolved, that a defendant, or a party, or any produced to make an affidavit, is no party within this law; and yet witnesses in court christian are excepted. So likewise, if a witness depose any thing in a circumstance which tendeth not to the matter in issue or question, it is not perjury within the law: as if there be a question of an inclosure, and a witness will depose a beating concerning the putting in of cattle, when indeed there was no blow, it was not within the law, as it was held in *Dynch* and *Doyley's* case, because it was not the matter

PART II. in issue; yet the lord *Egerton* held it punishable in the Star Chamber, and so it was punished. And although perjuries in court baron and court leet are punishable by this law, yet if the homagers make false presentments, or any jurors find indictments falsely, it is not within this law; for they are not witnesses in that case no more than any jurors whatsoever.

HAVING considered what perjuries are within the statute, let us see what perjury is punishable in this court not being within the statute. And I find, before the making of this law, that is in 4. *Eliz.* there was a positive order made, that no man should be punished for perjury in giving evidence to a jury, if the verdict passed with the evidence, unless the justices of assize before whom this trial was had, were made privy to it; because it seemeth, bills of perjury grew very frequent against witnesses, in all cases when a verdict was passed, to work a revenge or draw a composition, which the court thought fit to restrain. And it did well till the statute 5. *Eliz.* was made: but after there was found a greater mischief; for the judges being desirous to extend their own jurisdictions, and having power in that case by the law, drew all those complaints to indictments before themselves; so that this court quickly resumed their power, and hath fully retained the same unto this day.

BUT it hath been questioned, Whether perjury committed in the ecclesiastical court be punishable in the Star Chamber? which I suppose arose out of the exception in the statute 5. *Eliz.*; but the same hath been often cleared, and remaineth without scruple. And because in these courts, in all depositions taken on the affirmative part, the party deposeth *ut credit*, which is taken to be a sufficient testimony, it hath been adjudged, that a perjury may well be assigned upon belief, upon a deposition taken there, which cannot be in another court; and so it was adjudged in the Case of *John Barnardiston* against the lady *Barnardiston*, about 3. *Jac.*

MUCH

MUCH debate hath likewise been, Whether perjury committed in the stannary court shall be punished here? by reason that, by the antient charters, the lord warden hath power to punish it; but upon long debate all the judges of England resolved it in *Hill. 24 Jac.* Yet about 13. *Jac.* in the Case betwixt *Finch* and *Mansfield*, *mr. serjeant Hendon* pleaded the same plea to the jurisdiction of the court, for that the defendant was an inhabitant of the cinque ports, where the lord warden hath power to determine perjuries committed within the liberties; but the lord *Egerton*, being moved in open court, took the plea into his own consideration, and not only over-ruled it, but sharply reprehended *mr. Hendon*, being then a suitor for the coif.

It cometh late to be a question, Whether perjury committed in the chancery be examinable and punishable in the Star Chamber? But in 34. *Eliz.* in the Case between *Stephens* and *Spencer*, it was not doubted, both in the depositions taken before the examiner of the court, and before commissioners by virtue of a commission taken out of that court, which course is settled by five hundred precedents within one hundred years: yea, in 45. *Eliz.* one *Shepherd* was there questioned for making a false affidavit in chancery, for swearing that he was in possession of a tenement at the time of a bill exhibited in chancery, and thereupon obtained an injunction for his possession; for which he was questioned in the Star Chamber; and it fell out that both he and his adversary were in possession, and he was thereupon dismissed; for the law adjudgeth a possession in him which hath the right, which he presumed was in himself, and so no perjury.

BUT the question hath heretofore been, Whether a bill might be preferred in chancery for a perjury there committed? And in 12. *Eliz.* adjudged that it could not be but by Latin pleading in form of an action upon the statute, which must be transmitted for trial into the king's bench.

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bench or common pleas; for the defendant ought not to answer upon his oath, nor be examined upon interrogatories, in that court; and so, if perjury should be there examined, the king's suit should receive great prejudice and disadvantage. But I leave that to consideration, for that it is said that the chancery hath one precedent, like one swallow, to make their summer. But I believe, if it be well considered, it will be found to be no perjury, but a misdemeanor; and even that, in the Case of *Large* and *Agnescombe*, was held examinable in the Star Chamber. In 31. Eliz. betwixt *Jenison* and *Brand*, perjury being committed in an Answer in the Dutchy Chamber, and in the deposition of witnesses, they were both sentenced in the Star Chamber. And yet I suppose the Dutchy hath power to examine a misdemeanor committed within their own jurisdiction; for I find that in 4. Eliz. a riot was complained of to this court by the attorney general, in which a man was slain, and that by consent of the chancellor of the Dutchy, whose consent would not have been required, if he had not had jurisdiction. In Tr. 34. Eliz. in the Case betwixt *Dodson* and *Everenden*, perjury in an affidavit in the court of wards was here sentenced. In 12. Jac. *Rowland Ap Ellys* before-mentioned was here sentenced for perjury in proving an information in the exchequer for destroying the king's woods. So that perjury in all courts doth here receive its punishment; yea, perjury of homagers in a court baron was here punished 34. Eliz. in a Case betwixt *Bastard* and *Harvey*. But this court cannot examine the perjury of jurors in giving a false verdict between party and party by the practice of latter times, for that only is to be remedied by attain: but the imbracery, corruption, and instruction of jurors is here examinable. And the first Case that I find over-ruled in that point is *Hil. 2. Eliz.* in one *Snelgar's* Case and his fellow-jurors of Hampshire, before which time it was usual. Yet for a false verdict given in a court baron, a bill will lie in this court; and the reason

reason is, *ne delicta mancant impunita*, for no attaint lieth at the common law, as is before alledged, in inquests of office.

A LONG-debated question hath been, Whether perjury committed by any witnesses upon indictments for the king, shall be examined and punished in the Star Chamber? And the reason yielded hath been, for that it will deter the king's witnesses to yield their testimonies in all cases. In 16. Eliz. in the Case of *sir Thomas Cockain*, who preferred a bill against witnesses for perjury, in giving evidence upon an indictment for the queen, which was thereupon found, the cause was dismissed upon the report of the then attorney general *sir Gilbert Gerrard*. And in M. 24. & 25. Eliz. in the Case of *Edmond Trafford versus Booth and Others*, the defendants being charged with perjury in giving evidence upon an indictment of forcible entry before justices of peace, the cause was also dismissed. And in the same Case the judges certified, that perjury in a witness upon finding *in diem clausit extremum* for the king, cannot be questioned in this court by the king, it being his own title; and this by the opinion of the two chief justices, *Wray* and *Dyer*. And so in Hil. 16. Eliz. by the report of *mr. serjeant Jefferies*, perjury in a witness before Commissioners of Survey not here punishable.

BUT latter times and manifest corruptions of witnesses in the king's case, hath bred a settled course of punishing perjury even in witnesses for the king. In M. 3. Jac. it was twice debated; once in point of an indictment in the Case betwixt *Miles* and *Daventry*, and the second time in the Case of a testimony given in the exchequer for the king betwixt *Jenner* and *Warren*, where *Warren* testified falsely to prove an information of usury, and was sentenced to the pillory; since which time the question hath rested in peace. And in the Case of *Daniel Wright* upon an indictment of battery, although the plaintiff stood convicted upon

PART II. upon his traverse, the court sentenced the defendant for perjury, and that without scruple; where I may observe a difference between the judgment of the court given upon the sentence, and those that are led by the certificate of judges and private men, in which one sentence is of more weight than twenty reports.

ANOTHER good question hath been often moved, Whether after sentence given upon the testimony of witnesses, those witnesses shall be afterwards questioned for perjury? for that if their depositions be false, it overthroweth the sentence. But it was clearly adjudged in *Renard's Case*; for that otherwise wicked and perjured persons might ruinate any man by a false deposition in this court, and the party never able to prevent it (for he cannot know it till after the publication, at which time it is too late), nor the law should have ability to punish it; which were such a mischief as were fearful for the subject in this wicked age to live under their government. Neither was that a good distinction which was taken in *Smyth* and *Lacy's Case* by a great judge, that the subornation should be examined and not the truth of the testimony, because it trencheth to the overthrow of the sentence, or to prove it unjust, for the sentence is not dishonoured thereby; but the court judging according to the testimony, judgeth justly and honourably; and if the testimony be false, shall not the witness be punished? I make no doubt but that the three witnesses in the *Dutch Case*, if there were falshood in their testimony, might be justly punished, and yet the sentence of the lords, grounded upon their former testimony, be held just and honourable, in all ages, and amongst all nations.

BUT without doubt subornation cannot be questioned without perjury; for there cannot be a manner of doing without a subject, and perjury is the principal to which subornation is accessory; inasmuch as in *1. Jac.* in the Case betwixt *Read* and *Waterman*, where the person charged with perjury died hanging the suit, and the suborner

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suborner got a dismission, with costs, for not prosecuting; the costs were discharged, because the plaintiff could not proceed for the subornation without perjury. Since which time that precedent hath been often followed, and when an offender hath been charged with a riot, and upon his examination he hath denied it, and it is proved against him, and he is sentenced for it, and afterwards a bill preferred against him for perjury in denying it, in the opinion of the lord *Popham* this perjury is not examinable, for that it is necessary there should be an end of punishment; and if he should be punished for perjury for the denial of the riot, he might again be questioned for denying the perjury; so there would be no end, but it would be infinite.

It is true that, in former times, the court did punish the perjury of the denial in the first cause, to make an end of suits, and most usually in the Cardinal's time; and the same course continued long after; as we may see in *Crouche's Case* in 2. *Eliz.* which might well be done by way of aggravation of the offence, but was unjust to be done as the principal offence, because it was not complained of in the bill; and the court ought to punish nothing but what is, *allegatum et probatum* by testimony, unless the party will voluntarily confess it, as *Brüncker* did; and then the court proceeded upon his confession, although he confessed another matter than that he was charged with: he, being charged with perjury in making a false return as the sheriff, confessed that *he never took the oath of his office*; and was for that sentenced.

I HAVE heard it often moved, Whether a man swearing falsely upon a wager of law, it were punishable in the Star Chamber? And although I have not judged in the point, yet I dare say it is there punishable; for in 30. *Eliz.* a man put in a foreign plea to an action in London to bar the prosecution of a suit (which for favouring the jurisdiction of the court is always done upon oath), and this plea was feigned: this was punished; and then much more a false oath

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oath in a wager of law, whereby a just debt is made irrefutable. It may be thought strange that a man deposing truth should be punished for perjury, and yet it is most certain; for in the Case of *Vernon versus North*, a man was charged to have by persuasion deposed the value of cattle which he never saw; and that was held to be perjury, although he deposed truth. And in the Case of *Henry Earl of Lincoln* against *Jane Burr*, Trin. 1. Jac. in deposing a force upon an indictment, when in truth she was not then present, she was sentenced for perjury, although it was truth which she swore; and this also was in her evidence upon an indictment for the king.

I SHOULD run into a large field if I should set down indifferently what perjury this court hath examined, and may examine: I shall shortly attain my purpose to express what perjury may not be examined in this court.

AND, first, it is an undoubted case, that a complaint of perjury committed in a case not determined, ought not to be examined in this court; for if the truth or falsehood of a material deposition should be examined before the cause is discussed, in which it is made, it must necessarily prejudicate the court which was first possessed; and the reason of the case is adjudged in 2. *Eliz. Dyer*: whereas upon a suit brought for forging of false deeds against a baron of the parliament, the lord (hanging the suit) brought an action *de scandalis magnatum*; and adjudged that it lay not, hanging the first suit undiscussed. Neither, by the reason of that book, doth it lie after the suit determined; for it is no slander to sue in a proper court for any thing, although the suggestion be false. Yet one thing is to be observed wherein some of the judges have varied from the opinion of the court, for they in that case will adjudge the suit as no cause of complaint, and so upon demurrer to be absolutely dismissed; but the court hath constantly maintained it to be the only cause of suspension of the examination of perjury, until the first

suit be determined, if it be set forth by way of plea upon oath, being matter of record in another court.

ANOTHER perjury not punishable, nor examinable, is perjury committed against the life of a man for felony or murder whereof the party accused is convicted by verdict and judgment; and this perjury hath not been allowed to be examinable: and one reason is, lest it should deter men from giving evidence for the king; and another, lest it should bring a scandal upon the public justice of the kingdom, if the cause of a person so convicted should receive new examination; the nature of man being to count passionate the worst men in such extremities, and to pick small occasions to try a witness in any circumstance that might tend to make a guilty man seem innocent: yet assuredly, as well as the truth of a testimony given in a cause in this high court may, after sentence, receive examination in point of perjury; so, in strictness of reason, in my judgment, the other may receive examination; and it is forborne but only in discretion, that when a man is executed, the truth of his accuser's testimony may not be examined, because the execution cannot be reversed. No more is there any reversal of a sentence in this court; and therefore if some notorious complaint of villany should be discovered, wherein by false accusation an innocent man is attainted, surely at the suit of the king this may be examined and punished; yea, although the party were executed; as well as one *Ligeate*, in *M. 5. Eliz.* was questioned for executing one man for another in *Wyatt's* rebellion, and was there punished.

It is clear, and without question, that perjury cannot be assigned in a deposition where the deponent sweareth to his remembrance, for it cannot be known but yet that it is doubtful, for by his words and actions his knowledge may appear; nor in the affirmation of another man's speech, where the averment is, that he did not speak it; for if

PART II, twenty persons be present in a room, one person may hear the words and the rest not; but if the averment be, that the witness was not in that company at the time when the words were spoken, perjury may not be assigned if the party swear the words to be spoken at a time and place certain.

§. VIII. OF FORCE.

IN the next place I am to speak of force, which must be most principally defended in all well-governed commonwealths; it being the prime care in all governments to maintain the peace of the country: and this will branch itself into seven parts, *riots, routs, unlawful assemblies, forcible entry, duels, waylaying, and single assaults upon privileged persons.*

It is called a *riot*, when three or above assemble themselves together to do an unlawful thing and do it; a *rout*, when they only assemble themselves together to do an unlawful thing and do it not; an *unlawful assembly*, when two or more assemble themselves together to do some unlawful thing; a *forcible entry* may be committed by one person alone, if he enter with force or keep the lane with weapons, when neither he nor any from whom he claimeth hath been in quiet possession of the same for three years; so that a riot cannot be done but in the presence of three: but if two be actors and present, and the third an abettor and within view, it hath been adjudged a riot; and if two be actors and the third a commander, although he was absent, yet he was a rioter; as it was held in *sir George Manners's Case*: and *Hudleston*, at the suit of *Fleetwood*, in *P. 14. Jac.* writing a letter to two of his men from London, to cut in pieces certain turves which were digged in a pit in question, he was sentenced as the third rioter; and the reason which the lord *Coke* gave was, for that in force and treason there could be no accessaries, if there

were

were no commands; and therefore commanders are either principals, or no offenders.

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If two men come to do an unlawful act, and after them come two more by agreement, not to be there four at once, but *diversis vicibus*, this hath been adjudged a cunning riot, and severely punished. But if one known man, with divers others unknown, commit a riot, he shall be punished alone; and so was *sir John Towne*, in 2. H. 8. And in antient times, if a great man caused an outrage to be committed, he was alone fined to pay for all his servants by the poll. So was *sir Rowland Stanley*, 1. Eliz. for twenty⁷/₁ one townships which he drew together to commit a foul riot.

BUT of rioters, there be four sorts which the court most severely punisheth. The first, when it is committed *cum multitudine gentium*: such was *Langton's Case*, called the Briftow rebellion; and the suits betwixt *mr. Morgan* of Loternam and *sir William Morgan*, in 2 & 3. Jac. and betwixt *Baskerville* and *Scudamore*, 44. & 45. Eliz. The second is, when it is committed in the night, being a kind of *latrocinium*; in which case, though it hath been done to avoid force, which was feared by the adverse party, yet was it always severely punished; as in *sir William Hall's Case*, *ad sect. Ellis*, M. 8. Jac. The thrd kind is, when the rioters are disguised as men in women's apparel, or men with vizards; as in *mr. Kidderminster's Case*, M. 4. Eliz. where the disguised men were ordered to stand in the pillory in women's apparel, and the women rioters ducked. The fourth is the gratest of all; when an officer procureth a riot under colour of justice, and uses that sword to raise force which is made to suppress it; as in *Broughton's Case*, 4. Eliz. where one *Baker*, a constable, being to raise twelve or twenty persons to aid the sheriff, levied two hundred men in arms, and was sentenced to the stocks and pillory. And justices of the peace, which by colour of their warrants have caused riots to be committed, have been severely punished; as in *sir John Brett's Case*.

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THE acts of parliament giving allowance to these punishments are, 13. *H.* 4. c. 7. 8. *H.* 6. c. 24. and 1. *M.* and 1. & 2. *Philip & Mary*. The first two require certificates to be made by the justices of the peace to the king and his council; the latter make the assembly (if they depart not upon proclamation) felony, which is above the capacity of the court. But these certificates are not binding or concluding to the persons, but in the nature of a presentment, whereunto every man is allowed his excuse or defence. But I find that in former times they were much more used than now they are; and then the court upon the certificate used to commit the rioters to the Fleet. So in 2. *H.* 8. one *John Lowther* and *Gilbert Wharton* were committed to the Fleet for riots certified by the justices of peace of the county of Westmoreland. And in 2. *Eliz.* *Francis Jervis* and others were sentenced and fined upon the certificate of the lord *Wentworth*, and other justices of the peace of the county of Suffolk: but it appeareth upon the record, that upon their examinations they confessed the riots; so the certificate did but induce the court to examine it, and they were sentenced upon their confession.

By the same act of parliament, 13. *H.* 4. the justices are to make inquiry of the riot within the month; and it was usual in all great riots which were sentenced in *Philip & Mary's* times, and queen *Elizabeth's* time, that the court commanded the king's counsel to put in an information against the justices of peace next adjoining. And so it was done against *Graseley*, *Worley*, *Robinson*, and other justices in Staffordshire, for a great riot committed at Litchfield; where they excused themselves, that there was no complaint made unto them: and although it be not contained in the words of the statute, but that they should at their peril make inquiry, yet it was held to be the intention of the law, that if a complaint were not made, they were not under the penalty of the act of parliament.

parliament. And although the fact of parliament be, that two justices of the peace shall go with the sheriff or undersheriff to suppress the riot and apprehend the rioters, yet 14. H. 7. f. 9. *Fineux*, chief justice, holds, that any one justice may suppress the rioters, and commit them without tarrying for his fellows; but he cannot make enquiry of the riot, nor assess a fine upon the rioters, nor record the force upon the view.

For *routs*, they are for the most part most dangerous, for that they arise upon public grievances, as inclosing of commons, making of may-games, as it was in the *earl of Lincoln's Case*. And I have heard, that *Henry earl of Lincoln* in a private discourse said, that the *earl of Essex's* insurrection in London was but a rout, but that he durst not but find it treason (as he then said). But by the statute of 7. R. 2. c. 8, they were declared traitors;

UNLAWFUL *assemblies* are not punished with such severity as riots and routs, and yet are many times punished. It is true, that no time or place privilegeth a man but that he may commit a riot, because it is only of unlawful things; and if a man assemble men together in his house, and they be armed, it seemeth not to be unlawful, for it may be he heard he should be assaulted, and his house is his castle. But if he be threatened or menaced, he may not ride abroad with a company of men armed, as it is held in 21. H. 7. c. 39. and so adjudged in *sir William Morgan's Case*. And it seemeth by *Keble*, 3. H. 7. that an assembly of men is not punishable, if nothing be done, unless the assembly be in *terrorem populi*.

FORCIBLE entry or *detainers* have ever been punished with great severity. But it is resolved, that any man may keep his possession and maintain the same with force, either of lands or goods; and if any man will come forcibly to take away my goods, I may strike him, as it appears by 9. E. 4. and if my goods be wrongfully taken away, I may take them again by force; for so it is held 7. H. 6.

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f. 14. And the reason is, for that goods are not within the statute of 5. R. 2. c. 7. whereby it is forbidden to enter forcibly into any lands, although a man have a good title. And where by the statute 8. H. 6. forcible detainer is allowed only unto him who hath had three years quiet possession, in 3. & 4. *Philip & Mary* in this court it was held, that if a man be thrust out of possession, and upon complaint is restored, he cannot afterwards justify the detaining with force. Or if a termor which hath been in possession twenty years be expelled utterly, he cannot regain his possession with force. In 4. & 5. *Philip & Mary*, *Dyer* 16. it is said, that a woman may defend her quarantain with force, for that she is in the possession of the estate her husband had. And it is to be observed, that although justices of peace may upon their view record a force and commit the offenders, yet they cannot make restitution without they empanel a jury and make an enquiry, and the force be found, as it was adjudged in *sir John Brett's Case*. And a denial to open a door to a justice of peace is a forcible detainer in the law (as it was adjudged in the *Case of the King's Attorney against Stone*), for the which a justice of peace may commit a man, but can restore no possession thereupon. But after an enquiry made and found, and traverse tendered, the justices of peace may either grant restitution or deny it, at their pleasure, as it was held *Dyer*, 2. & 3. *Philip & Mary*, f. 127. Yet no other justice of peace but one of those that was present at the enquiry can grant a *superfedeas* of a writ of restitution awarded by them which were present, as it is, in 2. & 3. *Eliz. Dyer* 187. And I find that in *M. 2. Eliz. sir Uriah Brereton, sir William Davenport, George Calverley, and John Dutton*, four justices of peace of Cheshire, which were not present at the finding of a force betwixt *Hurleston and Dare*, and yet awarded a *superfedeas* to discharge a writ of restitution which was granted by the justices who made the inquiry, they were fined for it, and the possession

session settled according to the writ of restitution which was first awarded.

AND in the case of restitution of goods forcibly taken away, the same hath usually been done by the oath of the party, for he can best tell what he lost, and in his own case his oath shall be taken *in odium spoliatoris*. And so it was ordered in *Chamberlin's Case*, 4. & 5. *Philip & Mary*; where it may be observed, that he did not only swear what he lost, but what the goods were worth which he lost; and the value was restored him according to his own oath.

I AM in order now to speak of *duels*, which is a single fight only betwixt two; and that is either *duellum temerarium*, or *duellum per breve directum*, which was an ancient English trial. The judges have varied heretofore in opinion, whether this were punishable at the common law or in this court? And *Coke* said, that *delinquentes iracundiâ provocati puniri debent, &c.*; but the lord *Egerton* held it punishable by all laws. Howsoever, it is most sure that a challenge to single combat hath been ever punishable. So it was held, betwixt *Wharton* and *Elder* about 43. *Eliz.* and in *sir William Morgan's Case* before specified, before any proclamation: and the reason then given was, because it was a preparation to murder; for if a man endeavour to murder or poison a man, that endeavour is punishable in this court, although it never came in act. But since the edict and proclamation, his royal majesty, in the Case of *Christmas*, pronounced a sentence upon the breach of the edict, where the offenders were committed to the Tower, and fined a thousand pounds a man. And since, in *Ivy* and *Moody's Case*, a scurrilous message to provoke a quarrel was here sentenced; and it seemeth, that the giving of the lie to the intent to provoke a quarrel betwixt men of equality, is punishable in this court. But if the lie be given by a superior to an inferior, betwixt whom there is a just cause of contestation of truth and falsehood, it is no offence here punishable: as when a man is charged

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WAYLAYING a man to assault or beat him, is an offence ever held worthy of the sentence of this court: howsoever it be, but man to man they who shall so do, are in the number of *insidiatores viarum*, who in 7. H. 8. in the time of the lord cardinal were not thought capable of enjoying the benefit of sanctuary. In 27. Eliz. *Lodowick Grevill* lay in wait for *sir John Conway* at Temple-bar, and beating him with a bastinado, was punished for it. And if a man shall by any train draw a man to his house, as suspecting some familiarity betwixt him and the wife of him who so inviteth him, and shall assault and beat him, he shall be severely punished; and so was *sir Humphrey Tuston* at the suit of *mr. Nevill*; for this is a laying in wait for him: but if it appear plainly that he did abuse his wife, *quære*; for the court was much divided in this case.

ASSAULTS made upon privileged persons (men of the long robe) have been severely punished in this court. A courtier assaulted and hurt *mr. recorder Fleetwood*; he was fined, and put out of the queen's service. *Mr. serjeant Williams* being desperately assaulted by one *Watkin*, against whom he had been of counsel, the offender in M. 44. Eliz. for attempting to stab him, was sentenced to lose his ears, and perpetually imprisoned during his life. In like case *sir Edward Wingfield*, was fined for offering to assault *sir Edward Coke* in the street; and many others for assaulting churchmen.

§. IX. OF MAINTENANCE.

THE laws have been ever strict against maintenance in all ages. They began with the English lawgiver *Edward I.* 1. Westm. c. 25. 28. but these laws concerned the king's officers; and ministers observing the best course of reformation to begin at home, and the punishment in this court at the king's pleasure, stat. 2. Westm. c. 28. extended further to

to the chancellor, treasurer, and their clerks. Statute 1. *E.* 3. c. 14. stretcheth to all great men of the land, and to inferior persons, and mentioneth the particular kind of writing letters. Statute 20. *E.* 3. c. 4. forbiddeth maintenance in the king's servants, queen's, and prince's, and in all other persons; and their punishment is, that their bodies, lands, and goods shall be at the king's pleasure. By stat. 5. *R.* 2. c. 4. the king's counsellors and all other his officers, or any other inferior persons, were forbidden to maintain quarrels, and that upon pain of being ransomed. The 32. of *H.* 8. c. 9. includeth champerty and embracery of jurors, by letters or promises, and maketh the penalty of such buying to be the value of the lands bought, and the complaint is to be within one year after the offence committed; which law is an affirmative law, and keepeth on foot all former acts of parliament: and therefore if the suit be brought after the year, it must be laid generally against the laws and statutes, and not upon this law. But these laws are to be understood of such kind of maintenances which are justifiable; as if I have the reversion or remainder of land, I may maintain a suit concerning that land, because it is mine own interest. So may the feoffor and feoffee in use maintain a suit concerning the land. If one be indebted unto me, and deliver me an obligation made to him by another for satisfaction of my debt, I may sue this in his name, as it is in 15. *H.* 7. c. 2. If I grant to *B.* that if my tenant for life die he shall have my land for twenty-one years, *B.* may maintain suit for this land by reason of his possibility, as was held 9. *H.* 6. c. 64.; but if I buy an obligation and sue it, that is maintenance, 37. *H.* 6. c. 17. One that is allowed a curator of orphans goods in court christian, may sue in chancery for those goods, as it was adjudged in *Cannon's Case*. It is lawful for any man to disburse money in the prosecution of any cause for the king, as an indictment or any information in the exchequer or Star Chamber on the king's part, as it was.

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was held in *Deringe* and *Bettingham's Case*; and therefore the maintaining of suits in the Star Chamber, mentioned in the said statute of 32. H. 8. are to be understood of the defendant's part; for all suits on the plaintiff's part are the king's suits, and to maintain the king's attorney's suits was adjudged no maintenance in *sir George Reynolds's Case*; and to maintain a relator in a suit was held no maintenance in *Rose's Case ad scēt. attorn. ex relatione Floyde*. A kinsman may assist a kinsman in his suits, but the chief justice *Lee* held, in *Cannon's Case*, that the nephew could not disburse money for the uncle: *tamen quære*. And *Coke*, attorney-general, charged the lord *Sheffield* for standing in court to hear *sir Robert Dudley's Case*, being his brother by the mother, as a countenancer and maintainer of the cause; but it was held an unjust charge in divers respects: and it seemeth by the book of 15. H. 7. that deeds of charity cannot be interpreted maintenance; and yet if a counsellor shall speak in causes without fee, as an assignment in *formā pauperis*, it is held maintenance, although perhaps he knew the party poor. For maintenance in buying titles, it is doubted, *Dyer*, 34. H. 8. whether one in remainder may buy a pretended title to gain a possession from the true tenant of the land in possession? But if land be in question in chancery, it is not champerty to buy the land hanging that suit, or hanging any action of trespass at the common law; for such suits may still be kept on foot to keep the owner from selling, as it was held by the lord *Egerton* in the Case of *sir Rowland Dymock* and the earl of *Lincoln*, and in the Case between *sir John Stafford* and *sir Thomas Throckmorton*, M. 3. Jac. It is no maintenance for the tenants of a manor to join together to maintain their customs, as the judges held in *Dunch* and *Doyly's Case*. But the lord *Egerton* held, that if a tenant prescribe that he and all those whose estate he hath in that tenement have used to have common in certain grounds, the rest of the tenants of other tenements cannot maintain that suit, because it tendeth to the particular. But the judges were of another opinion;

opinion; for they said, that every tenant must so prescribe for his several tenements. But where the pleading is, that *infra talem villam talis habetur consuetudo*, all in the town may maintain their custom. So it hath been much questioned, Whether the parishioners might with a common purse maintain their custom for tything, by reason that every man's suit is particular? But the former case over-ruleth it. And yet tenants or parishioners may not tie themselves by writing or by oath to maintain any other's suit, for that was ever held unlawful; and so adjudged in the *lord William Howard's Case* against his tenants in Cumberland. Yea, an agreement to maintain a suit and to divide the benefit of it, is maintenance at the common law, although no suit ensue; and so adjudged in *Egerton's Case* against *Starky*, *Hil. 14. Jac.* and there said, that it is the worst maintenance, because it giveth fuel to all suits. And it is proved by the case of *Dyer*, 1. *M.* 5. if a juror takes money to give a verdict, and yet he gives no verdict, or a man undertakes to maintain, but doth not maintain, they are both punishable; and the Old Book 30. *Affize* there cited for proof. As a man may not buy a title hanging the suit, so may he not after judgment given in it before execution of a writ of error be brought to reverse the judgment; and so it was adjudged in *Mouse and Weaver's Case*, *Mich. 44. & 45. Eliz.* where the case was, that a recovery was had in an assise in a court baron against *Mouse*, and thereupon judgment given but by order out of the exchequer execution stayed, and the plaintiff and defendant by order of their interrogatories pleaded. *Weaver*, after the judgment, spent money in the suit in the exchequer, and it was adjudged maintenance. To take a lease of lands to the end to defend the title in a suit to be brought, was adjudged maintenance in *sir Oliver Lee's Case* against *Lidyard*, in *P. 4. Jac.* and to maintain a suit of goods to have part, is here punishable.

For preparing, labouring, or soliciting of jurors, and their being laboured, cometh here necessarily to be spoken of.

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of. It is a dangerous kind of maintenance; and it is clear that the writing of a letter to a juror to appear and to do his conscience, was held embracery. *Quære*, for that embracery is properly betwixt the party to the suit and the juror, and not betwixt strangers? as in *ſir Thomas Lucas's* Case, where he had nothing to do, for *miſcuit ſe alieno*. But the party himſelf may labour the jurors to appear; yet if he acquaint them with the ſtate of the cauſe, or they promiſe to ſtand to him, as in the Caſe betwixt *Ognell and Parſons*, *M. 33. Eliz.* the jurors were ordered to ſtand on the pillory at Weſtmiſter and at the aſſizes, and the verdict to be of no force. And ſo in the Caſe where the king's attorney was plaintiff by relation, *Hauleſt* againſt *ſir Thomas Brereton*, the delivering of a brieve of the cauſe to a juror hath been held an offence, and ſeverely puniſhed in *Tunbridge's* Caſe. But in the Caſe betwixt *Becket and Raſhley*, a juſtice of peace in Cornwall, a juror coming to him about buſineſs for the king, *mr. Raſhley* ſpoke to him to appear; and there lying an exemplification on the table before him, ſaid, "there was that "that muſt end the controverſy, but read it not;" this was held no embracery. So *Coke* ſaid, it was lawful to tell the juror what the iſſue was, being no more than was contained in the record of *niſi prius*. And ſo to ſpeak of a record and make no inference thereupon, was no offence.

UPON the hearing of a cauſe of that nature, I remember the *lord Egerton* told the court, how that he being ſollicitor general to queen *Elizabeth*, and ſtanding behind the lords, and namely behind *Robett earl of Leiceſter*, when a cauſe was heard concerning the writing of a letter to a juror to appear, the great earl asked if that were a fault, and ſwore, he had done ſo a hundred times. I could not by the way, but note how neceſſary a thing it is, that the great lords of the kingdom ſhould not neglect the ſtudy of the law, of their own country, where they are to ſway and govern, and where, by their example, in breach of law (perhaps through

through ignorance), the whole multitude follow, as led by their example or authority. PART II

THE labouring of jurors before they are empannelled is as well punishable as after; for *M. 31. Eliz.* three jurors of Middlesex which agreed to acquit *Lodovick Grevil* if they should be of his jury to try him, wore papers in Westminster-hall, and were grievously fined. So also if they accept money for a reward after the verdict given, it is an offence punishable in this court, although out of the statute of *Decies tantum*, as is proved 39. *Affize*, pl. 19. Neither is it necessary that jurors should take, promise, or receive money, and be imbraced; both which are required in a *Decies tantum*, as appears 39. *H. 6. c. 31.* for otherwise the action will not lie. But if a juror have a good bargain in lands, or any chattels, for to yield favour in his verdict, it will be punished, as may appear in *Fitzh. Decies Tantum*, pl. 19. Infinite are the punishments of jurors and those which have imbraced juries; and the question now is not thereabouts, but only concerning the jurisdiction of the court, Whether the truth or falsehood of a verdict betwixt party and party may be examined? which I have ever held to be examinable as in aggravation; for it is a greater offence to give a verdict against an evidence than according to an evidence, although the party be prepared; for as the reverend lord *Egerton* would often remember, *Vendere justitiam insania est, vendere injustitiam nequitia.* And therefore to examine the truth of the verdict as an accessory argument to prove that the jurors were corrupted (as I urged it in *Atwood's Case*), I see no inconvenience; but my lord *Verulam* received it at that time. But of this subject I have spoken before.

I SHALL yet add a word or two concerning what persons may maintain by profession; and I find that by profession only a barrister or counsellor or attorney may maintain a cause at the bar, or in prosecution, and their clerks. And upon an action brought upon the statute of

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32. *H. 8.* of an information, the one may justify that he is *eruditus et in lege peritus*, and for his fee maintained the cause, *prout ei bene licuit*; and the other, that he is an attorney in that court, and sworn, and that the party retained him, and so justify. But for the first, I have heard a traverse taken to a counsellor's plea to an information in the exchequer, *absque hoc quod prædictus defendens fuit in lege peritus*; and that was one *Prince's Case* of Shrewsbury, who was the only man in his age that was allowed to practise at the bar by letters patent under the broad seal, and never called to any inn of court, which I suppose was a reason of the traverse. But if a counsellor will give advice to vex the subject, or deceive private persons or the king, or to break a good wholesome statute law, *mr. Lambert* holdeth that punishable here. But sure it is, that if a counsellor or attorney will take upon him to compass a jury, that is punishable. And so it was held in *Bradley's Case*, who escaped by faint proof; he being assuredly the greatest and most notorious preparer of juries of any attorney in that part of the kingdom; under the burthen of whose corruption by that practice the county of Salop hath groaned many years, and if the lord *Egerton* had lived, would have been delivered ere this time. So that the rule is, that serjeants and counsellors (who for aught that I can find in the Book of Entries are all one in this case) may maintain, so long as they keep within the lists of their duties to their clients; and so must attorneys do also; for an attorney in the common pleas cannot justify the following of a cause in the exchequer, as it was adjudged in *Poftern's Case*, who was sentenced for it *M. 45. Eliz.*; no more can a clerk of the chancery the following of a cause in the Star Chamber, as it seemeth: and yet that may be a question, for being allowed to write to the board to be a clerk to the lord keeper, the clerks of the Star Chamber being his lordship's clerks also. But in our age there are stepped up a new sort of people called solicitors, unknown to the records

records of the law, who, like the grasshoppers of Egypt, devour the whole land; and these I dare say (being authorised by the opinion of the most reverend and learned lord chancellor that ever was before him) were express maintainers, and could not justify their maintenance upon any action brought: I mean not where a lord or a gentleman employed his servant to solicit his cause, for he may justify his doing thereof; but I mean those which are common solicitors of causes, and set up a new profession, not being allowed in any court, or at least not in this court, where they follow causes; and these are the retainers of causes, and devourers of men's estates by contention, and prolonging suits to make them without end.

THERE are yet another sort of people which may maintain one another's cause; and that is, one defendant may maintain the suit of his fellow defendant; for otherwise his own cause may have prejudice: nay, if a bill be preferred against two for one offence, and against one of them for another offence, he that is not charged may maintain the whole suit, for the prosecution in form looketh not to the matter but to the ordinary course; and I am of opinion, that the party may examine witnesses in the latter case, in the cause that he is not charged. And my reason is, because that if he be innocent of the offence in which he is charged jointly with the other, yet if his fellow should be sentenced by the course of the court, he loseth his costs, and there is no reason but, if he may receive advantage by it, he may do his endeavour to make his fellow's cause appear truly to the court; and this more properly than *amicus curiæ* may at the common law.

§. X. OF FRAUD.

THE common law of England hath evermore abhorred covin and deceit; so that those things which are most favoured

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voured in law, yet being mixed with fraud, they are made tortious and unlawful; as *sir Edward Coke* hath declared in *Farmer's Case*: There is no question but the law punished fraud before the making of the statute 13. *Eliz. c. 3.* but the proviso in that statute; that false deeds made *bona fide* should not be construed within the law to be fraudulent, hath begotten more fraud than former ages ever heard of; for to colour their wickedness it is now usual to make a pretext of some poor consideration, thinking thereby to perfect their fraud; and that was punishable before that law, as appeareth in *Paucefort's Case*, 3. *Rich.* fol. It may be a hard matter for me to describe what will be a fraudulent deed within the law or statute. And for that *Twyne's Case* must yield our direction, which we must take as it is reported, by *sir Edward Coke*, making a cause to be fraudulent as it pleased him in the time of his potency, which will serve for an example as well as another.

ONE *Pierce* being possessed of a term for years of lands of good value in Hampshire, and of a stock of corn to a great value, was indebted to *Warberton*, a pensioner to queen *Eliz.* in 200l. and to *Twyne* in 400l. *Warberton* sued his bond. *Pierce* conveyed all his corn, cattle, and goods whatsoever to satisfy *Twyne's* debt, upon condition to pay ~~at~~ a day; but *Pierce* during the time did continue the possession, yea and marked the cattle as his own. *Warberton* had judgment and execution, and *Twyne* understanding of it, resisted the execution by colour of his deed. And this deed was adjudged fraudulent, first, for that it was general of all his goods and chattels; secondly, for that he kept the possession after the grant; thirdly, for that it was never published till the sheriff's coming; fourthly, for that it was made after the suit commenced for the first deed; fifthly, for that there were some unlawful clauses in the deed; sixthly, although it were made upon good consideration, yet was it not made *bona fide*, whereas both are within the provision of the statute; and because it is but a word, I will

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will explain this last first, for it soundeth something insensible. But, the case of bankrupts explaineth it plainly. Where a man being indebted to many will deliver his goods to the satisfying of one expecting relief from him, and so the rest are wholly unsatisfied, this delivery (although there were a just debt) is fraudulent to the rest of the creditors, who ought to be all equally satisfied.

For the explanation of all the other points, I must put another case, whereby it will appear, how far forth the former rules will hold water. *Paramore* was indebted by obligation to *Moore*, *Burlemacke*, and others, to whom *Moore* stood engaged for him in 500l. and stood in bond also to *Speak* in 1000l. by recognizance for a just debt. He was possessed of the great farm of Michaeldever in Hampshire, and of a stock of corn and cattle to the value of 1000l. In February he conveyed all his goods and moveables in Michaeldever to *Burlemacke*, upon condition for security for his money at a day; but, by his servants, sowed the ground, shored the sheep, sold the wool, and had formerly given *Burlemacke* other security for the same money. The beginning of May *Burlemacke's* man entered by virtue of assignment, secretly. May 26, *Speak* sued a *scire facias* upon recognizance, and upon the 2d of March he had judgment and execution in Trinity Term, and took out an *elegit* to the sheriff of Hampshire, who took the goods in execution, and was resisted by *Moore* by publication of the deed. And it was adjudged that this was no fraudulent deed. First, *All his goods and moveables in Michaeldever* is a general of an especial, and not *genus generalissimum*, to be intended all the goods he hath, whereby he left himself nothing, as it was in *Twyne's Case*. Secondly, That it was lawful for the grantor to keep the possession until he faileth of his payment; and that agreeth with the lord *Dyer's* opinion in the *Almoner's Case*. Thirdly, That the grantor needed not to publish the deed until there is cause given him. Fourthly, Although he have a former security,

PAR. II. security, yet he may take a latter without fraud, and so have two strings to his bow.

I DARE not comment upon these two judgments, for I know they are notorious; it will easily appear where one was extended and the other diminished; but the rules arise plainly out of either whereby a fraudulent deed is manifested. And this was ever agreed for a constant ground, that a feigned or no consideration will make a deed fraudulent, but a good consideration will not defend a deed from fraud, as I said before in the sixth reason of *Twyn's Case*: for although it were at first made truly, yet if it be after fraudulently used, it destroyeth the whole force of it, as it was adjudged in *Burrell's Case*; which was, the grandfather made a lease of his land to the father of 1000 years upon covenants of marriage; the father before the death of his grandfather assigned his lease to his son under age, and others, for payment of his debts; the grandfather died, the father continued the use and possession of the lands, and sold the reversion for a valuable consideration to *Burrell*, who entered, and was thrust out of the same by virtue of the assignment of the lease; and the same was adjudged fraudulent, and within the statute.

ANOTHER settled ground there is, That howsoever a fraudulent deed shall be damned against the creditors, yet it is good against the grantor; so that where deeds are damned as fraudulent, it must be understood that it was only against him by whom they were made to deceive; for a deceiver otherwise would take advantage of his own wrong.

I SHALL hereafter touch, that an infant, or a *feme covert*, shall be punished by this law, as it was in the Case of *sir William Wifeman*; and that is upon the ground of my lord *Dyer*. That statute binds all persons but such as are excepted; and then deeds made for the protection of the estate of one that intendeth to become a fugitive, is expressly within the law; and that was *Whittingham's Case*.

But

But if a man be to fight a quarrel upon a duel, and maketh a deed for the protecting of his estate if he should kill his adversary, whether this deed be fraudulent or not in itself, is a question in *Hayward's Case*, but referred to the judges, and never certified.

I HAVE observed, that in divers cases an agreement and practice to do an unlawful thing, although the same were never put in execution, was held to be punishable; as an agreement to maintain a suit and, to share it, was held the worst maintenance. But in the Case of one *Day*, 45. *Eliz.* it was agreed, that an agreement that a fraudulent deed should be made, but the same never made, that agreement was no offence; and I conceive the reason to be, because the deed is not *malum simpliciter*, but *secundum quid*; for it is only bad in respect of the creditor, or otherwise that deed is good.

AND this court hath power as well as any other to avoid a judgment had by fraud, and to command the record to be vacated, as well as the Judges of the common pleas did in *Harrison's Case*, in 8. *Eliz.* where the judges, finding the judgment to be fraudulently confessed, made a *vacate* of it. As when one that was adjudged at the quarter sessions at London to be whipped, and being committed to the comptroller confessed a judgment of 200l. to an attorney of the common pleas, whereupon he brought him by *habeas corpus* to the common pleas bar, and there he was committed to the Fleet in execution, which was out of the power of the city of London, no question but this court might have caused this judgment to have been vacated, and the prisoner to be remitted to his punishment. And I know no reason but the same course may be held upon all judgments where young men are drawn to confess a judgment for a security without any consideration, of which sort there are innumerable; for surely as to subsequent just deeds, they are as fraudulent.

§. XI. OF LIBELLING, AND SCANDALOUS WORDS AGAINST NOBLES.

IN all ages libels have been severely punished in this court; but most especially they began to be frequent about 42. & 43. *Eliz.* when *sir Edward Coke* was her attorney general. But it must not be understood of libels which touch the alteration of government; as,

The Cat, the Rat, and Lovell the Dog,
Rule all England under a Hog;

or the work of *mr. Williams* of the Temple, not long since executed at Charing Crofs; but libels against the king's person and nobles have been here examined. So was that in 7. *H.* 8. at which time, for the discovery of the hand, the books of all the tradesmen in London were to be viewed, with two aldermen and a knight appointed by the council to confer the hands and manner of writings at the Guildhall, whither they were to be brought sealed for that purpose only; and this done for the discovery of the author.

~~LIBELS~~ are of several kinds; either by scoffing at the person of another in rhyme or prose, or by the personating him, thereby to make him ridiculous; or by setting up horns at his gate, or picturing him or describing him; or by writing of some base or defamatory letter, and publishing the same to others, or some scurvy love-letter to himself, whereby it is not likely but he should be provoked to break the peace; or to publish disgraceful or false speeches against any eminent man or public officer. Of each of these I shall only remember an example or two, and then leave it to the search of infinite precedents.

For a libellous rhyme, *Bland* against *Dowies* and *Others* was an unhappy libel in verse against the plaintiff and his wife,

wife, which *Davies* took upon him to make, being a barber in London, and was justly sentenced to be whipped for helping himself, for assuredly he was not able to have written such a line, for which he was sentenced about 1. *Jacobi*; and before that *Holloway's* Case in Chancery-lane; and in 37. *Eliz.* *Barney* against *Farmer*, two justices of peace, one against another. The personating of the *earl of Lincoln* in a play was severely punished; and *doctor Millway's* Case is not forgotten, wherein the defendants were severely punished, yet the lord chancellor *Egerton* said, that he held not the doctor in that business to be St. Augustine.

PICTURING or setting up horns at a man's gate was severely punished in the Case of *Horsey v. Astley*, 33. & 34. *Eliz.* And in the great libel of *Wells*, there being a fame against a townsman that he lived incontinently with the wife of the plaintiff *Hole*, in a May-game used yearly in that town they brought a man riding with a board before him on which was a pair of nine-holes, one riding at the one side saying, *He holes for a groat*; the defendants being many in number were severely punished for this pastime.

AND for scandalous letters, the precedents are infinite. One of the first sent to the person himself was *Lloide*, register of the bishop of St. Asaph, against *Peter Breverton*, clerk, sentenced *M. 2. Jac.* and yet the defendant would have undertaken to have proved the contents of the letter to have been true, he thereby charging him with bribery and extortion in his place. Then was *sir William Hall's* Case against *Ellis*, a scoffing letter, and severely punished. A scurrilous letter from one mean man to another, was *M. 12. Jac.* sentenced at the suit of *Barrows v. Lyelling*, and the same only sent to the party himself. Nay, *Norton v. Roper*, 1. *Jac.* was sentenced for writing a scoffing letter by one rival to another.

BUT if the letter be written to a man in authority, as in *Trin. 32. Eliz. Hide v. Smalley* for writing a letter to the

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mayor of the borough of Wallingford, charging him with injustice, that was severely punished; and a letter written by *Booth* to *sir Edward Coke*, charging him with some cautelous courses in prosecuting a forgery, was sentenced to the pillory: nay, disgraceful words and speeches against eminent persons have been grievously punished in all ages. In 8. H. 8. one *Scott*, a justice of peace of Surrey, was punished for speaking certain words against the lord cardinal; and in the same year one *Knivett*, and one called *Long James*, for using uncivil words to the sheriff of London, in the wrestling-place at Clerkenwell. And 12. H. 8. one *Soye* was sentenced for raising a false report of the lord *Dacres*, of South. And in 7. H. 8. *Lucas*, a privy-counsellor, was sentenced for speaking scandalous words against the lord cardinal. And in the days of queen *Elizabeth*, one sentenced to the pillory for saying the lord *Dyer* was a corrupt judge; and *George Vernon's* Case, at the suit of *mr. serjeant Greco*, for speaking against *sir Henry Townsend*.

AND the publishers of libels are as severely punished as the makers; therefore it is usually said, that it were a punishment to a libeller if no man would publish it. Therefore, to hear it sung or read, and to laugh at it, and to make merriment with it, hath ever been held a publication in law.

~~THERE~~ are two gross errors crept into the world concerning libels: 1. That it is no libel if the party put his hand unto it; and the other, that it is not a libel if it be true; both which have been long since expelled out of this court. For the first, the reason why the law punisheth libels is, for that they intend to raise the breach of the peace, which may as well be done, and more easily, when the hand is subscribed than when it is not. And for the other, it hath ever been agreed; that it is not the matter but the manner which is punishable; for libelling against a common strumpet is as great an offence as against an honest woman, and perhaps more dangerous to the breach of the peace:

for

for as the woman said she would never grieve to have been told of her red nose if she had not one indeed, neither is it a ground to examine the truth or falsehood of a libel, because it is *sub judice* whether it be a libel or not; for that takes away *subiectum questionis*, and determines it to be no libel by admitting the defendant to prove the truth, and the defendant in that case ought to plead a justification, and demur in law; but if he pleads not guilty, the question is gone whether it be a libel or not. The writing of a letter to the nearest friend of a person, thereby to draw him into displeasure, and work him any dishonour or prejudice, hath been held an offence deserving the sentence of this court. And so it was held in *Peacock's Case* and *Reynolds's Case*, and many others. But at this day the offence of writing provoking letters is much encreased by his late majesty's * edicts and proclamations published to suppress all provocations of quarrels, although the words or writings tend in strictness of law to be libellous. I could spend much time in the discourse of the libels of these days, but *sir Edward Coke* hath shortly and pithily set down the diversities, who (I think) in his time was as well exercised in that case, as all the attornies that ever were before him. Yet cannot I omit the observed course, that in this court a libel made against a dead man shall be punished; as *Lewis Pickering's Case*, for his scornful libel against that reverend prelate *archbishop Whitgift*: but whether only in this court, or by indictment at the common law also, I am doubtful; for as a trespass to the party it cannot be, and as a scandal to him that is dead in his public service, it hath been adjudged, that words of imputation against a great judge after his death should not be examined, lest the public justice might receive prejudice when he is gone, that should make it appear to be false and scandalous; which was the judges' opinions in *Stroud's Case*. And yet surely the king may punish

* King James.

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the detraction of his public justice. But this is left to the discretion of good and temperate times. And I desire to observe one difference, which standeth with the rules of law and reason, and which, under favourⁿ I have ever conceived to be just, That upon the speaking of words, although they be against a great person, the defendant may justify them as true; as in all actions *de scandalis magnatum*, which are as properly to be sued in the Star Chamber as in any other court, and he shall be there received to make the truth appear. But if he put the scandal in writing, it is then past any justification, for then the manner is examinable and not the matter. In some cases a libel shall not be examined; as where a libel is made against me, and I hold it more prejudice to me to have it published than if it were concealed; as it was held in *Lamb's Case*, of which I shall take occasion to write a word or two in another place.

§. XII. OF CONSPIRACY AND FALSE ACCUSATION.

I WILL conclude the particular offences which I shall speak of with this great offence of *conspiracy*, rarely heard of in former times, but in our age grown frequent and familiar. And herein some questions have arisen; as in the Case betwixt *Rocheſter* and *Solm* it was questioned, Whether if the party is *legitimo modo acquietatus*, he may sue in this court for conspiracy? for *sir Edward Coke* would have maintained, that after his acquittal he was to prefer his indictment at the common law, where conspirators were to have their villainies judged. But the *lord Egerton* did gravely confute that opinion, and open the jurisdiction of this court, manifesting that notwithstanding the party might have his indictment, yet that excludeth not the court of jurisdiction; for in all cases of force or fraud an indictment lieth at the common law; yet this court will proceed for the king also. But afterwards, the evidence
being

being read, the case appeared to be, that *Rochester* struck *Solm's* father on the head, and broke his head. Being a sickly old man. old *Solm* about a month after fell sick and died, and on his death-bed complained of his hurt. *Solm* his son and others his friends indicted *Rochester* for the murder; who, upon his arraignment, being acquitted, preferred his bill for conspiracy: and upon the whole matter the court thought not fit to proceed; for the son had just cause and ground to prosecute *Rochester* upon the indictment, there being a blow, and a death shortly ensuing; and the death of the father, who complained of the blow; and therefore it is no ground to say the jury acquitted him; and therefore your indictment was false; for many times great offenders escape upon indictments, and yet perhaps the prosecution is not without malice (for the truth may be accompanied with malice); and then I know not but every acquitted delinquent may bring his writ of conspiracy; which I the rather touch, because I heard this error publicly broached by a learned man.

BUT when the party is indicted, and not *legitimo modo acquittatus*, then can no conspiracy lie, as it was adjudged in *Daniel Wright's* Case. And therefore in the Case of *Baker* against *Hall* and *alderman Lumley and Others*, for prosecuting an indictment against him upon the statute of 3. H. 7. for taking away a woman against her will and marrying her, which indictment he avoided by error, and upon hearing it was adjudged that he could not prosecute a conspiracy. Otherwise it is if the party be never indicted, and that either the malice of the adversary cannot prevail to have the indictment found, as it was in *Poulter's* Case; or the plot be discovered before it come so far, as it was in the Case of *sir Anthony Ashley* *. In both these cases conspiracy will lie in this court; and yet no action or indictment will lie at the common law, unless the party be indicted, yea and acquitted also.

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THUS then out of these judgments it appears, that this court hath jurisdiction in all cases of *conspiracy* where the common law hath any, and in divers cases further than the common law. And to manifest that this is no usurpation of this court in latter times, I find that in 7. H. 8. one *Palin* and *Blackenball* are there sentenced, for that they did "maliciously and without cause reasonable" (for these are the words of the sentence) accuse one *Cuthbert Laughton* for clipping of money; and in 18. H. 8. one *Constance* the wife of *John Young* was questioned for false accusing of *Thomas Young*, his brother, to have made away and murdered her husband, whom she knew to be alive, as appeareth by her own confession before the cardinal; in both which there appears no indictment or acquittal once mentioned to be precedent to the same.

I MUST also observe, that by the common law no indictment of conspiracy can lie but against two at the least; but in this court, if one man falsely accuse another, he shall be here punished, as in conspiracy. And so was *Lee* not long since sentenced and branded for practising subtilly to accuse divers men of great worth to have been guilty of the Powder treason; and so was *Pye* for malicious seeking to indict *mr. Myrick* of the Temple for felony; in both which cases both the defendants stood on the pillory, and lost their ears, and the one was branded with F. A. in the face.

IT appears by *Fitzherbert* in *Nat. Bre.* in his Writ of Conspiracy, that if a man be falsely indicted for felony, and the same felony be pardoned by a general pardon, although to manifest his innocence he will plead to the indictment, and he be acquitted, and will take no advantage in pleading of the pardon, yet at the common law he may have no action of conspiracy; and the reason there given is, for that his life was not in jeopardy. But there is no question but this Court will for the king punish this offence, and hath jurisdiction sufficient, which is proved by the

Cases

Cases before alledged; for before the indictment life could not possibly be in hazard, and yet the offenders were punished. And this complaint of conspiracy doth not only lie in the case where a man is prosecuted for felony, treason, or rape, but where he is indicted falsely and maliciously for any trespass. But especially there be many examples where many have been maliciously indicted for common barratry, because that tendeth to the utter ruin of a man's reputation, which is as carefully preserved in this Court as life itself. *Fitzherbert* puts a case where conspiracy lieth, for that a man was falsely presented in the Fleet for suffering a felon to escape; which, without question, is punishable in this court.

§. XIII. OF CAUSES HERE EXAMINABLE, NOT OTHERWISE PUNISHABLE.

LEAVING now the particulars, I come to express the great and high jurisdiction of this court, which, by the arm of sovereignty, punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, or giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea although no positive law or continued custom of common law giveth warrant to it. Such are all punishments of breach of proclamations before they have the strength of an act of parliament, which this court hath stretched as far as ever any act of parliament did. As *11. Eliz.* builders of houses in London were sentenced, and their houses ordered to be pulled down, and the materials to be distributed to the benefit of the parish where the building was; which disposition of the goods foundeth as a great extremity, and beyond the warrant of our laws; and yet surely very necessary, if any thing would

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would deter men from that horrible mischief of encreasing that head which is swollen to a great hugeness already.

IF a corporation shall be rent asunder by faction, and that they shall by a wilful and heady practice displace any which ought to be their officers, this court will restore him and punish them; as they did in 17. H. 8. to the company of dyers of London. If one troublesome man disquiet the rest of a corporation, this court will punish him: so they did *Dunning*, one of the pewterers, M. 3. Jac.

ATTEMPTS to coin money, to commit burglary, or poison or murder, are in ordinary example; of which the attempt by *Frizier* against *Baptista Bassin*, in 5. Eliz. is famous; and that attempt of the two brothers who were whipped and gazed in Fleet-street in 44. Eliz. is yet fresh in memory.

NAY, if a man practise to have himself indicted of felony where he may have clergy, to the end to be delivered out of execution, this is punishable; and in 31. H. 6. his arraignment was stayed until the king and his council's pleasure were known.

IF a young man shall be drawn to the company of a lewd woman, and once as her husband shall enter the room and take him with her, and by this plot shall wrest from him money, land, or leases, this is punishable, as *mr. Lambert* thinketh; or if men shall draw a young man into a continued drunkenness, and in that drunkenness shall draw from him the estate of all his lands, this is punishable, as in the late Case of *Lerckwith*. If a man be outlawed and have his pardon, and yet will cause his goods to be seized as for the king, and thrust them into the hands of a person trusted by him, there to be protected against his just debts; this abuse of the king's prerogative is punishable. A woman practised to have her husband whipped, but the same was not performed; and after her husband's death she married again: his father sued her for this practice; and although the action died with the person at the com-

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moh law, yet she was severely punished, as it was in *Rayman's* and *Beckley's* Case.

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PARTIAL executing of any writs by sheriffs hath been here often punished, as was *sir James Fitz-James* in 5. *Eliz.* To make an unjust and partial sale of goods taken in execution, was punished in the Case of *Beck* and *Tyrrell*, *Hil.* 34. *Eliz.*

A JUSTICE of peace denying to do his duty in granting the peace, or any other thing, or in doing his duty wilfully, maliciously, or corruptly, hath been here ever severely punished; as may appear in all the sentences betwixt *sir Henry Winsone* and *sir ——— Throckmorton*, *et c contra*, and betwixt *Alban Stepneth* and *Warren*. But errors in judgment are not punishable.

THE embezzling of evidences by slight or covin is here punishable; so was it adjudged in *Ratcliff's* Case against *Tudor*, and taking away of a bond of 1000*l.* sentenced betwixt *Stephen* and *Spencer*, 34. *Eliz.* The opening of passages and maintenance of bridges hath been here enjoined; so was it in the town of *Kingston upon Hull*, 21. *Eliz.* The breach of duty of any of the king's great council, or ministers, is here, and ever hath been here, examinable. So likewise rude and uncivil behaviour, or ill words to a justice of peace or public magistrate, as calling him a fool, &c. An abuse in homagers in court leet who refuse to make presentment according to their duties, was severely punished in 4. *Eliz.* in the cause betwixt the *earl of Arundel* and the *lord Lumley*, where one of the homagers who brought in a blank paper, and said that was their verdict, was adjudged to wear papers at every leet day for seven years.

IF a man employed in the king's service for the defence of the realm shall be arrested for a just debt, whereby the king's service shall be prejudiced, that hath been punished severely in him which only sought legal justice. And in 34. *Eliz.* one *Barney* was sentenced for arresting *Woodhouse*, a man employed by her majesty.

FOR

PART II. FOR a man to cause himself to be sued, by which suit a prejudice shall grow to a third person; such was *Starkie's* Case against *Dodman*, 33. *Eliz.*; and that and none other was the case of *sir Robert Dudley* in suing his man, which called him bastard, in the ecclesiastical court, thereby to obtain a sentence of legitimation; whereby the crown should have lost a great reversion, and some great men after that time a great portion of their estates, which they had purchased after the land was supposed to have reverted to the crown.

IN the time of king *H. 8.* this court took great care to punish those that kept public dicing-houses and bowling-allies, and the lord mayor and aldermen had charge to bring them in, and they were punished; as also were *Gerrard* and *Parsons*, who kept unlawful games about 41. *Eliz.* a raging mischief in the Commonwealth, worthy of mr. attorney general's consideration.

AND also the inveigling of young gentlemen, and entangling of them in contracts of marriage to their utter ruin, to which no statute made extendeth; as the Case of the *lord Cavendish*, *Chambers*, and others. I remember that in *Dunning's* Case *sir Edward Coke* delivered for law, that if merchants engross a commodity into their hands thereby to raise the price, that is an offence punishable. And it is true, that in 40. *Lib. Assize*, pl. 38. one raised a report in the country, that the wars were so hot beyond the seas that merchants could not pass, by reason whereof the price of wool was much abated; and he was fined and ransomed before the council of the king; yea and that was by *ore tenus*, upon his own confession.

A MAN, upon pretence of title, taketh cattle *damage feasant*, and selleth them in a market overt, which for the pretext of title is no felony but a foul trespass, and therefore punishable in the Star Chamber; and that Case was in question betwixt *Hall* and *Spelling*, 6. *Jac.*

IF men in authority punish any one by pretext of their office which in truth ought not to be punished, the officers shall be grievously fined. So were *Skinney* and *Latcher* for whipping of *mrs. Nevill* in *Bridewell*.

IF subtle merchants or tradesmen will draw young gentlemen under age before a judge, or any other which hath power to take a fine or recognizance, knowing him to be under age, he shall be grievously fined. So was *Hide* of *Cheapside*, *Pasc. 41. Eliz.* for procuring one *Strangerways*, an infant under twenty-one years, to enter into recognizance for silks. Yea, the drawing of young gentlemen into security for commodities of tobacco and phillizellas, and such unnecessary stuffs, which they are compelled forthwith to sell away to bickers at half the value, is usually fined; as in late times in the *Case of Woodward* against *Denity*.

IF one shall take upon him to be an herald, and without good and lawful authority visit the country, and so draw money from the subject, he shall be severely punished.

IF one shall take upon him to be an escheator without lawful authority, he shall be punished; as one *Day* was, and nailed to the pillory, 4 & 5. *Philip & Mary*. And *Brockard's Case* is not much differing, who executed his sheriff's place without oath.

BEFORE the statute of 5. *Eliz. c. 10.* there was no law against invocation of evil spirits, and yet in 4. *Eliz. Coke* and *Bisson* and others were sentenced there for practising of sorcery.

MR. CROMPTON puts a case which he saith is there punishable, but I can find no example of it, which is this: Upon an *elegit* the creditor causeth the jury to find more land than in truth the debtor had, to the end he might have all the land of the debtor, which the debtor delivered as the moiety, and so obtained it: it standeth with great reason that such a practice should be severely punished, and yet the debtor hath no help by course of law for a moiety, because

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cause the creditor is in by matter of record; and against the jury there lieth no attain, because it is but an inquest of office: and I conceive that this is the reason why it should be here punishable, and the injured person redressed for a false verdict in a court baron shall be here punished, as I have said before; and the reason of that is, because no attain lieth, and so the party should be without remedy.

BUT it may be thought that *Brent's Case* in 5. *Eliz.* was of a strange nature; where a complaint being made to this court that *Brent* consumed his estate in lewdness, and that his wife and children had not wherewithal to maintain them, the court directed the master of the rolls and the under treasurer to settle him in a course certain, and the court ordered him to obey it; which order, though it foundeth merely civilly, ariseth out of this crime; and *interest reipublicæ ne quis suâ re malè utatur*; and it may be *Brent* had been a lunatic *per lucida intervalla*.

SOMETIMES a dishonest breach hath been here punished, as in *Trin.* 34. *Eliz.* in the Case betwixt *Gooche* and *Worlich*; where the defendant being bound as surety for the plaintiff, and having goods delivered unto him to discharge the principal, suffered the bond to be forfeited, and then to be sued, and thereupon put the counterbond in suit, thereby to gain the forfeiture of that obligation. And in *M.* 35. *Eliz.* the like Case was sentenced betwixt *Smith* and *Woolefall*. Nay, in cases where the common law denieth the party to sue, this court doth enable him; as in the case of Revivor, Riot, or Traverse, which the court adjudgeth, contrary to the opinion of the judges of England.

INFINITE more are the causes usually punished in this court, for which the law provideth no remedy in any sort or ordinary course, whereby the necessary use of this court to the state appeareth; and the subjects may as safely repose themselves in the bosoms of those honourable lords, reverend prelates, grave judges, and worthy chancellors,

as in the heady current of burgesſes and meayer men, who run too often in a ſtream of paſſion after their own or ſome private man's affection, the equality of whoſe juſtice let them ſpeak of who have made trial of it, being no ſubject fit for me to diſcourſe of.

§. XIV. OF SUCH OFFENCES AND ACTIONS AS BY THE CONSTITUTIONS AND STATUTES OF THE REALM ARE HERE EXAMINABLE.

HAVING ſpoke of ſuch crimes as are examined in this court, although no conſtitution or law have been made for them, I ſhall in the next place a little diſcourſe of ſuch offences and actions as by the conſtitutions and ſtatutes of the realm are here examinable. And therein I ſhall omit to ſpeak of force and fraud, and thoſe which I have particularly mentioned already, and ſingle out ſuch other offences as I find ſpecial conſtitutions and ſtatutes for.

AND the firſt is, flanders of noble and honourable perſonages, judges, and prelates, who by the ſtatute of Weſtmiſter 1. c. 35. and of 2. R. 2. c. 5. are to be impriſoned till they find their author; but by the ſtat. 2. R. 2. made at Canterbury, c. 11. they are to be puniſhed by the advice of the council. The ſtat. Weſtmiſter 2. appointeth, that one reſuſing to replevy cattle, as one reſuſing the king's juſtice, *puniatur per redemptionem*, and ſo were the defendants at the ſuit of ſir Robert Mouſon. The ſtatute 27. E. 3. c. 18. giveth power to this court to inflict damages upon them who ſhall here make a falſe complaint, to the ranſom of the party; but this is who hath no *juſtam cauſam litigandi*. The ſtat. 5. R. 2. c. 2. Forbiddeth any man to paſs beyond the ſeas without the king's licence, and the earl of Arundel attempting the ſame was puniſhed not long ſince for it.

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THE 16. R. 2. c. 2. limits the suit in *præmunire* in this court, as is before alledged. All wrongs and injuries to the disturbance of merchant-strangers which come into this kingdom by the king's safe-conduct, were appointed there to be fined by the stat. 27. E. 3. c. 1. B.; and stat. 13. R. 2. c. 2. appointeth, that if a question arise between the constable of England and the marshal of England who should have cognizance of a cause, this court ought to determine it: a great prerogative, to determine the difference between those high courts. And I know no reason but is properly the cognizance betwixt the chancery and the court of wards, or either of them, and the king's bench or court of requests, might be here determined; but this is an argument only *à simili*. Yet let me observe, that this act of parliament giveth this court civil jurisdiction in the great and high point of judicature. I find in Fitzherbert, *Nat. Brev.* in the Writ of Protection, that king Edward 1. having protected his clergymen and their goods against his own ministers, did appoint, that if they were disturbed, the ministers which disturbed them should be brought to answer it before the king's council; for which purpose there is a special writ in the Register. And I well remember certain purveyors for timber, not long since, sentenced for making over-bold with the timber of the lord bishop of London at Fulham.

THE stat. 24. H. 8. c. 13. forbade wearing of silk in apparel, and directed every man's apparel in his degree. In *Hil. 2. Eliz.* many gentlemen were sentenced in this court for breach of that law; and amongst others, *Lancelot Vaughan, William Puther, Francis Mudson, Thomas Green, et al.* The stat. 33. H. 8. c. 1. appointeth, that if any man shall by any counterfeited and false letters, messages, or tokens, get any money or goods from any man, he shall be brought into this court and punished; and so were *Ferris and Baldwin, ad festam reginæ Elizabethæ*, and most severely punished. The stat. 7. E. 6. c. 6. forbids

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forbids the felling of wines by retail but only by such as are licensed; and one that had a license, by colour thereof countenanced another to sell wine by retail: in *M. 4. Eliz.* he was severely punished for eluding that act of parliament. The taking away a maid within years by the stat. 13. *E. 4. c. 13.* was to be punished by a year's, imprisonment and fine at the king's pleasure, which was to be set in the king's court; but the stat. 4. & 5. *Philip & Mary*, c. 8. increased the punishment to five years imprisonment, although the fault were less, being by persuasion. And so was the sentence in *Dawes's Case*, and in *Brookes's*, and many others. By the stat. of 5. *Eliz.* all men were forbidden to use any other divine service than what was thereby appointed; and in the 3. *Eliz.* the *lord Hastings* and *sir Thomas Wharton* were here brought to the bar for hearing mass, yet all punishment remitted, and they received to the queen's mercy. The stat. 5. *Eliz.* c. 21. for hunting deer in inclosed grounds, and the stat. 3. *Jac.* for destroying of game, are usually put in execution in this court, and the offender punished with grievous severity, whether disguised or not. Yet it hath been much questioned, whether by reason of the stat. 1. *H. 7. c. 7.* which maketh it felony after their denial upon examination, they should be again examined in this court; and held that they may.

§. XV. OF THE SUPERLATIVE POWER OF THIS COURT.

- HAVING now shewed what jurisdiction seemeth to come to this court *de incremento* by these acts of parliament, although in truth the court in most of these cases had the same power before; I shall now add, shortly, a few words to manifest the superlative power of this court, not only to take causes from other courts and punish them here,
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PART II. but also to punish offences secondarily, when other courts have punished them.

FOR the first I find a notable precedent in *Trin. 1. Eliz.* The court understanding of a great riot committed by *Lister* and his company against one *Delaber*, in Herefordshire, within the marches, and the matter being there examined before that council, *certiorari* was awarded to the council there to certify the examinations of the witnesses to this court, not leaving the cause to be by them punished, but punished it themselves. And although sometimes, if the first complaint be there exhibited, this court (if the cause be petty) is contented to remit the same, yet in great offences, although the inferior councils have certified their priority, the old lord chancellor hath refused to remit it; as he did in *Robinson's Case* against *Metcalf*, knight. And it is true, that in the time of *cardinal Wolsey*, who entertained all suits, and of all kinds, when the court was overlayed he sent, at a clap, all causes arising within the marches to those courts; all within the *duke of Richmond's* limits he remitted to his council; and to the lady princess, to her; some, to the duchy; some, to his commissioners of *oyer and terminer*; and those within the county palatine of Chester, to the marches of Wales. But that was not because this court had no jurisdiction, no more than if she should remit a forgery to be tried by an issue at the common law, which it often doth, and after resumes the sentence to this court.

IN 4. & 5. *Philip & Mary*, betwixt *Astmore* and *Midelmore*, who lived within the precinct of the marches, there were suits for riots and for perjury. The riots were remitted to the marches, but the perjury ordered to be here examined; and yet, at that time, by that commission, they had power to punish perjury. A few of these favours done to these commissioners by the steru guider of this court maketh them play at check with this high state of justice; and if they shall receive a little
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more countenance, they will quickly give a mate. It is needful therefore that there be much care taken of the increase of the precedents, unless they continue full of caution of the power of this court, and that the court be pleased to remit it. For so the *lord Egerton* would often do; but he never put any from hearing because they were within the jurisdiction of the marches.

BUT for the punishing of offences which other courts may punish, the precedents are infinite of all kinds. For misdemeanors committed in any court, the judges of that court may punish it: so may the court of Star Chamber also; as in the unlawful alteration of pleading in the common pleas in *Huffry and Bradley's Case*; razing of finable writs to save the fine, in *Tisdall's Case*, and long before in *Starling's Case*; all extortions in all courts; bribery, and corruption of officers: and not only misdemeanors in cases, but the very cases themselves; as an idiot may be enquired of by the country, and examined by the council of the court of wards; and so may the king's council examine him, and determine it. For if this court allow him to have discretion, it avoideth all other inquisitions and examinations, as it is in *Fitzherbert's Nat. Brev.* 44. in the writ *de idiotâ examinandâ*. And so in 8. H. 8.'s time, the cardinal chancellor commanded one *Trednock* newly to appell one *Dowmand*, supposed to be an ideot, and then examining him adjudged him to be no ideot: In like manner in ravishing the king's ward, the court of wards (and before the erection thereof, the chancery) had power to punish it. Yea, *sir Robert Constable*, in 16. H. 8. for taking away one *Agnes Brisacres*, the king's ward, without license, and affaicing her to his son, submitted himself on his knees upon the quadrangle of the table in this court. So also for taking away the king's widow, *sir Randal Brereton* in 8. H. 8. having countenanced the same for one *Richard Brereton*, at this bar made his submission, and begged for mercy. In a word, there is no offence pun-

nishable

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nishable by any law, but if the court find it to grow in the Commonwealth, this court may lawfully punish it, except only where life is questioned.

I COME to the last, which is manifest, that although courts do punish offences or misdemeanors, it is no *super-sedeas* for this court; but this court will punish it notwithstanding, if they see cause.

IN *Mich. 4. Eliz.* in the Case betwixt *Berry v. Bagnall*, although the matter were heard in the king's bench, and the defendant there fined and committed, yet was the cause here ordered to be prosecuted against the same defendant, And in the case beforementioned of *sir John Conway* against *Lodowick Grevill*, the defendant was first fined before the justices of peace in Middlesex, and yet afterwards sentenced in this court, it being but for a mere assault. And so also fines set by any justices of peace for any riot or force, are no obstacle to the high power of this court, but in their discretion they may either fine it, or add some exemplary punishment unto it.

ABOUT 4. *Jac.* one *Sherwood* preferred a bill in this court against *Frances Blashfield* and others; and it was for poisoning his horse, coming into the town to be a suitor to her daughter. The plaintiff first complained at the council of the marches, and the cause was there heard, and sentenced, and the party recompensed for his loss; yet afterwards the plaintiff exhibited a bill in this court; and the cause, notwithstanding his pleading, was here heard, and the defendant again secondly fined and punished. In *Dunkley's* Case, often mentioned, which was for razing of a writ of *capias utlagatum* wherein was *John Hoskins*, and making it *James*, whereby the goods of *James Hoskins* were taken to a good value, and he carried to gaol; in this case the matter was examined in the court of common pleas, whence the writ issued, and to which court the abuse was offered; and, upon examination, the judges committed the actor of it, and fined him: and yet a bill being

ing exhibited in this court, he was most heavily sentenced in 19. *Jac.*

AND to all this discourse I must add one word, which is above all: A suit here cannot die; for if the party die, the king's attorney may proceed for the king; so may he if the party agree; nay, although the cause be dismissed at the suit of the party, as in *Sherfield's Case*; *Trin.* 5. *Philip & Mary*, and many more of later times. But therein there must be this caution, That it be prosecuted before a general pardon; for otherwise it standeth absolutely dismissed, as it was adjudged in the Case of *Cooke* against *Thomas*, 13. *Jas.*

§. XVI. OF THE PRIVILEGES OF THIS COURT.

HAVING now gone through my prefixed heads of the causes handled in this court, I shall now briefly enter into one short consideration of the *privileges of this court*, which if the principal judge should not carefully and severely maintain, it would detract much from the dignity thereof.

THE privilege of the court principally consisteth of these points: That if any man exhibit a suit in this court, and coming to follow his cause or attend his attorney be arrested, the court will send a writ of *habeas corpus*, directed to the keeper of the prison in whose custody he remaineth, to bring his body to this court; and upon the bringing in of the body he shall be delivered, and the action against him discharged.

So likewise if any man be sued in this court, so that his personal attendance be required, if he shall be arrested he shall have the like writ of privilege, stretching in the substance no further than any other court at Westminster; that is, that if he be arrested *eando, morando, aut redeundo*: but in the circumstance it stretcheth much further; for in this Court the action is absolutely discharged, whereas in

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the other courts the suit is only removed. But that cannot be (as it is supposed) in this court, for that there cannot be a legal trial of any personal contract or trespass, the cause not being from thence sent to trial, as out of the chancery, which surely may be done with as much equity.

AGAIN: In this court, if any party in court shall arrest any who hath a suit, he that causeth that arrest shall be committed to the Fleet for his contemptuous breach of the privilege of this court in arresting him, who in his knowledge is tied to give his attendance upon the court; yea, although the party arrested be a person disabled to commence a suit; of which there was a notable precedent in the time of the lord chancellor *Egerton*. ---One *Ellis* put in a bill against *sir William Hall*, and served him with process to appear in the Star Chamber. After the process served, *sir William Hall* arrested *Ellis* at his suit at the common law. *Sir William Hall* appeared in this court to *Ellis's* bill, and pleaded in bar an outlawry; that *Ellis* before and after the time of the process served, and appearance made, was outlawed, and so disabled to sue. After this plea put in, *Ellis* required his privilege upon the arrest, and moved to have *sir William Hall* committed for breach of the privilege of the court; whereupon it was alledged to the lord chancellor, that he was a disabled person, and could neither sue nor have privilege, for that at the time of the arrest no disability was pleaded of record, and without the pleading he was not disabled in this court; and yet by reason of the newness of this case, his lordship spared *sir William Hall's* commitment, and only ordered him to pay the warden of the Fleet's fee.

BUT some question hath been, Whether a stranger, not party to the suit, shall have privilege? And first, for witnesses, it is clear that they shall; and in 39. *Eliz.* one *Kaughan*, who was relator to the then queen's attorney in this court against one *Sherville*, *Jefferies*, and others; *Sherville* arrested *Vaughan* in London, who crav-

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ing his privilege had the same granted unto him, and made returnable *mediatè*, and was discharged in the afternoon at the lord keeper's house.

ANOTHER question hath been stirred, Whether after a defendant is admitted to his attorney, whereby he is discharged of personal appearance, and the process to remain afterwards served upon him are but warning to give him notice, and do not require his personal attendance; if upon such attendance he be arrested, he shall have privilege? which the same lord in the case of one *Ezechiele Croft* thought reasonable; affirming, that he being then to examine his witnesses, no man could so well give instruction to counsel to draw his articles as himself. But one great strictness is required in the allowing of the privilege of this court: That whereas in other courts the writs of privilege go forth upon bare suggestions, they never are awarded here but upon oath that the party arrested was going to, attending, or returning from, the court; in which cases, if the party desire only to discharge himself, the *lord keeper Egerton* gave a general power to the clerk of the court to award the writ of privilege of course; but if they punished be pressed for the contempt, then must the prince, judge, or court, be moved. But now of late the judges of the king's bench have refused to give allowance to the writ which hath been antiently allowed to the plaintiff which here followeth his cause, for that the words are *pendente placito in eadem curiâ*; making the interpretation thereof to be, that then no man should be sued in any other court, whilst he had any suit here depending; whereas the meaning of the writ is, that his privilege is to be allowed unto him at any time hanging the suit. And what is that privilege? *Eundo, morando, redeundo*; and that not upon every suggestion, as it is in the court of common pleas or king's bench, but it must appear to be true upon oath, or else the writ is not awarded: yet upon that sudden exception, without argument or judgment, the clerk of the process hath

PART II. hath altered his antient form of his writ, which may be prejudicial in future times.

I HAVE already heretofore touched the privileges of the officers of the court, who being the lord chancellor's clerks may surely be as properly privileged by him as his menial servants; and if his lordship shall once direct one man to appear before him in the chancery, and there let the current of his justice run; it would surely free all future clamours of all sorts.

ANOTHER privilege this court hath, that if any offenders be here punished for animating, abetting, or procuring the offence, by the course of this court the procuror shall not only bring in him whom he did procure to answer, but he shall also, if it please the court, pay his fine for him; and so was it in *sir Rowland Stanley's* Case, in *sir Richard Mansell's*, and in all the great Cases of antient times.

A THIRD privilege this court hath, although the offences be here criminal, yet the husband, although he be a stranger to the offence in this court, he shall pay his wife's condemnation; and so was *sir Henry Townsend* compelled to do for his lady, in *sir Richard Egerton's* Case, after long debate and view of divers precedents in the point, and amongst others *Seymour's* Case, 2. *Eliz.* 7.; and that was one of the greatest questions which was then determined upon such great deliberation of the judges.

§ XVII. OF CONTEMPTS.

If I should not shew in what cases and sorts this court doth punish affronts and contempts, I should omit the chiefest means of upholding the jurisdiction of this court. The original process being but a motion, and no attachment in many cases, if it should not be countenanced, and the

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the scorn thereof severely punished, it would in short time be brought to utter contempt and neglect; and therefore, if a minister shall be reviled in the serving of the process in this court, or the writ scorned or rejected, upon affidavit made thereof, the party offending shall be committed; or if the defendant shall offer to smite or strike him. So I find in 2. H. 8. one *Cheefman* was committed for drawing his sword upon him which served process upon him in the church of Esherford, in Essex. But if a stranger standing by commit the contempt, he is first called by process before he is committed: so was one *Benwell* in 1. H. 8. for keeping one *Clerk* (who served a process upon one *Trentham*) and making him drunk whether he would or not. Neither shall the defendant be allowed in this court the means to acquit himself by his execution, as in the chancery, except in some case the worth and reputation of the party charged, or the vileness of the accuser, bring the court to suspect the truth of the oath. And if the outrage committed be heinous, the court will cause an information to be put in for the same; as in the Case of *Hill* against *Norton*, the defendant compelled him that served him with the process to eat it. And it is not only in serving of the *sub-pœna*, but of all other the process of the court. As not long since an extent went out of this court on the behalf of one *Popham* against *Harvey*; and the jury being laboured, could find no goods of *Harvey's* but an old barrel and a turkey-cock. And for this scorn the court ordered his majesty's attorney-general to put in an information against the jury. And in like manner it is, if a witness attending or being examined in this court, shall be threatened or ill used, or any commissioners evilly entreated, the court will punish this as contempt against the court. As in the 4. *Eliz.* the lord viscount *Binden* calling one *Harding*, who was examined against him, "*knave*," he was fined in 100*l.* for that abuse. And as parties, commissioners,

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missioners, and witnesses, must behave themselves civilly, and with due reverence in executing all things by authority of this court, so must likewise the pleading be discreet and the questions asked. For if they shall endeavour to rip up the lives one of another impertinently to the case in question, they shall be punished, as I have formerly declared in the First Part.

BUT if after sentence any man shall derogate from the same, this court hath severely vindicated the same. In 3. *Eliz. fir Rowland Stanley* having been severely sentenced in this court, went down afterwards into Cheshire, and there reported, that he was not sentenced or committed by any that had authority to commit him; and for these words the then attorney was ordered to prefer a new information against him. And as in an abuse of words, so in an action, if any man shall disobey the same, he shall be committed, close imprisoned, and fined for contempt; nay, fed with bread and water, as *Markham* was until he did submit himself. But if it be alledged that there is no ability to perform it, if the plaintiff can make proof of any fraud in conveying away the goods to defeat the plaintiff of the benefit of the decree, the court will give an assistance by commission, testimony, or new bill, to manifest or discover it. So in the Case of one *Creuch* in 4. *Eliz.* the attorney-general was appointed to examine him concerning the sale of his goods, whereby the sentence of this court was defrauded, and yet the plaintiff had a commission to make proof thereof; and that appearing, he was punished: which course was begun against *fir Thomas Brereton*; but the case then received a composition. It is not possible to recapitulate what words or what actions make a contempt, but those are left merely to the discretion of the grave and judicious moderator of this great and honourable presence.

FINIS PARTIS SECUNDÆ,

PART.

PART THE THIRD.

Of the COURSE of the COURT of STAR CHAMBER.

§. I. OF THE CONVENIENCY OF THE OBSERVATION
OF COURSE.

BEING in the last place to treat of the course of this high court, it is fit, before I make particular relation of the form of all the proceedings, I should in general shew, that it is convenient, both for judge and suitor, that a certain course and form of proceeding should be followed in all cases, and not every thing ordered *ad libitum judicis* in every case. And the reason thereof is, first, for the judge, to whom it would be very troublesome to give a several direction to every cause, how it ought to proceed to hearing; which surely at the first the judge did, until the continual usage, by the direction of wise men, in process of time bred a rule, which was found to stand conveniently with justice for the court and the subject. The second benefit of the observation of course, is the benefit of the suitor and his counsel, who by reason of the stability of form is able to give advice in what paths the suitor may safely tread without danger to his cause, or peril to his person. The third reason is, for that this course of court by long custom hath obtained the force of a law; and although the book 5. E. 4. fol. 122. be, that precedents do not rule law but law rules precedents, yet *Plowden* in the *Case of the Mines* agreeth, that the course of the court is the law of the court, yea, the law of the whole kingdom for masters examinable in that court. And *sir Edward Coke* in his Second Reports in *Lane's Case* affirms, that the common law takes notice of the course of every court of the king as of an universal law. And if of all other courts; then of this

PART III. this especially, it having been settled by the consent of so many noble, learned, and grave judges in all laws, and not any thing repugnant to the common law of the kingdom.

AND this great benefit redoundeth to the judge in following course, that whatsoever mischief shall fall out in a particular cause, his following of universal form is an excuse against the most violent detractors. Yet let this be understood, that if it shall appear that the general course of the court will be mischievous in some one case, either for the king or the subject, the court hath power to alter the usual form in that particular case; for otherwise, by the subtlety of men's inventions, common course would overthrow good order: but this must be done upon weighty considerations, and in open court.

§. II. OF THE PROCEEDING BY ORE TENUS.

AND since I am to set down what the form is for the prosecuting of a suit in this court, I must begin with the inception of every suit; which is, either by some particular person's complaint, or by the curious eye of the state and king's council prying into the inconveniencies and mischiefs which abound in the Commonwealth. And these have, for the most part, several kinds of proceedings. Particular persons' complaints are, either parties grieved, or informers: informers are, again, either in their own name, or relators to the king's attorney-general; but that, in some cases, the king's attorney-general hath some privilege, and those have an ordinary course of proceeding; who are all the sorts of plaintiffs in this court, except the king's almoner only. But the suits which arise upon the animadversion of the state of some growing mischief, which is like to prove dangerous if it be not nipped in the

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the bud, that for the most part hath an extraordinary kind of proceeding, more short and more expeditious, which is called *ore tenus*; which course of proceeding, howsoever much blamed, as seeming to oppose the Great Charter, and other acts of parliament, whereof I have spoken in the First Part of this Treatise, by reason there is no judicial proceeding nor complaint exhibited whereunto the party charged to be an offender hath space given him to answer, or liberty to advise with counsel, in respect of frequency would be wished to be forborn; yet in case of necessity the lawful use of this course of proceeding would appear as fair to the eye of justice as any other whatsoever.

FOR when some dangerous persons attempt some unusual, and perhaps desperate inventions, which, in short time, may be very like, to endanger the very fabric of the government, these persons are apprehended by a pursuivant or messenger, and privately examined, without oath, or any compulsory means, concerning the fact. If he shall deny the accusation, then cannot the court proceed against him *ore tenus*; but if he confess the offence freely and voluntarily, without constraint, then may he be brought to the bar; at which time his confession is shewed him; and if he acknowledge it, then who can doubt but that the court may justly proceed *ex ore suo*, and give a judgment against him: *sed cum confitente reo citius est agendum*; but if he then deny it, although it be subscribed with his hand, and in the presence of the king's council, which are present to testify the same, yet is the rule so strictly held, that they must proceed upon confession; and *Pye* so denying his confession was remitted from the bar, and the court afterwards proceeded against him in a formal manner by witnesses.

AND it may be observed, that I say that the proceeding by *ore tenus* must be done only upon confession; for, therein sometimes there is a dangerous excess. For whereas the delinquent confesseth the offence *suo modo*, the same is
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strained againſt him to his great diſadvantage. Sometimes many circumſtances are preſſed and urged to aggravate the matters which are not confeſſed by the delinquent; which ſurely ought not to be urged, but what he did freely confeſs in the ſame manner. And happy were it if theſe might be reſtrained within their limits, for that this courſe of proceeding is an exuberancy of prerogative, and therefore great reaſon to keep it within the circumference of its own orb. And ſurely if this juſt courſe were duly obſerved, I think none that would be content that offences ſhould be puniſhed, will find fault with this kind of proſecution. For, firſt, no proof can be urged but what cometh out of his own mouth; and to extenuate that offence, and mitigate that cenſure, he is and ought to be heard ſpeak for himſelf; but himſelf muſt only ſpeak for himſelf, his counſel may not. Thus equal juſtice being conſtant in this court, that as no man accuſeth him but himſelf, ſo may no man excuſe but himſelf. his tongue being like *Peleus' baſta, ut ſola nocet poterit ſic ſola mederi.*

§. III. WHO MAY EXHIBIT SUITS IN THIS COURT.

I COME now to the ordinary proſecution of cauſes upon the complaint of particular perſons; wherein there ariſeth, firſt, to be conſidered, what perſons may exhibit a ſuit and make complaint in this court, and what not. And for that, it is firſt undoubted that an alien may exhibit a ſuit in this court; for it ſeemeth to be the proper court for merchant ſtrangers which are robbed of their goods to complain. And ſo *R. 3.* ſat to hear the cauſe of the Spaniſh merchant upon the ſtat. 27. *H. 3. c. 13.* And of latter times *Guerrin*, a Frenchman, proſecuted a ſuit

A suit against *for Richard Hawkins*, for unlawful favour shewed by his connivance, who suffered the pirates who robbed *Guerrin* to escape; which bill came to hearing: but the stranger being ill advised in the framing thereof, it took no effect. And in that suit the worthy chancellor took this indifferent order to compel the Frenchman to secure the payment of the defendant's costs, which he did by depositing 100*l.* in court; a necessary course to be followed; for otherwise when they have vexed the subject, they may leave the kingdom at their pleasure, and the defendant remain remediless for his great expences. So likewise, if an infant within age shall complain by his guardian, or *procchein amy*, the guardian shall be answerable for the costs; but if the suit shall continue till the infant come to full age, and then the infant prosecute it, he doth then become liable for the whole from the beginning of the suit.

A MAN entered into religion might heretofore have prosecuted a cause in this court; and the reason is, for that the suit is for the king; in which case, at the common law, a religious person might sue to enable himself to pay the king; for divers suits were of that nature in the times of *H. 7.* and *H. 8.*

To be short: no sort or condition of people, from the king to the beggar, but in their particular capacities may sue in this court; for so many of the most indigent people have done in times past, and severe punishments have been inflicted upon most eminent men for wrong done to those that were most miserably poor; as against justices of the peace for whipping of those which were not to be whipped by the law.

BUT especially cautions are to be used in poor men's suits. The first is, that care be taken that no man be admitted to sue *in formâ pauperis* unless he bring a testimony of credit that he hath just cause to complain; otherwise the court will be filled with clamours and vexatious

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suits of poor people living in remote parts. The second is, if two men join in a suit, the one able and the other poor, the able man may not sue under colour of the poor man's poverty, and save his purse. The third and last is, that if those of the poorer sort, although not *in formâ pauperis*, have suits, which, on presumption, are clamorous by reason their persons are infamous, or that the matter hath received many trials against them, then they may be bound with surety to pay costs, if they prove not the bill: but otherwise, great care is to be taken that every man be not bound with sureties to pay costs. For so, if a great man in the country oppress a poor man, no man dareth be bound for the poor man for fear of the displeasure of the rich, and so the poor shall be without remedy, of whom the court in former times hath taken the greatest care. And thus much of several distinct persons who may sue in this court.

BUT it hath been heretofore much questioned, Whether several men might join together in one suit for several matters? And some judges have certified, that they could not in this court more than at the common law; and the reason they yielded was, for that one man might by that means maintain another man's suit. But assuredly it is no good reason, for that every suit in this court is the king's suit, and it is lawful for any man to maintain the king's suit; and it is fit that a grieved person join another with him in his complaint, for fear of death, outlawry, or other disability, and they jointly prosecute the cause; which they may both do, as well as any stranger may inform. And that every man may inform for the king in this court, there is no question, except in some causes, where discretion stayeth the prosecution, lest the grieved party receive injury instead of comfort. As in the case of an infamous libel made against a man, a stranger may not inform without the consent of the grieved party, for so they may bring his reputation in question; whereas perhaps he is contented that his dis-

grace

grace should sleep, some men being willing, to wear their horns in their pockets, rather than upon their heads. Again, if a great judge of this kingdom should be scandalized for corruption, every man may not complain of the scandal; for perhaps it were sometimes better for the public justice of the kingdom that the same sleep, than if it were questioned: but in these cases the party grieved must give his approbation, unless the king's attorney prosecute it. But if any offence be committed, and a stranger will put in an information for the same, and calleth the defendant to answer, and afterwards the party grieved shall exhibit his bill, the information shall not bar his suit, but shall stay; for such information may be put in by collusion, and may be either remissly prosecuted or negligently proved, and so the king loseth his benefit. But if the information had been put in by the king's attorney, *that* would have barred the plaintiff's proper suit, for that it is intended, he will take care of the king's profit, and the Commonwealth's example; and the grieved party upon his suit shall be recompensed, and so there is no inconvenience. Again, if one disabled person complain, and a plea is put in to the disability of his person, which shall be hereafter shewed, and afterwards a stranger will inform, the second shall proceed, for the danger the king may lose the suit by the disability of the former. But if the first shall set himself *rectus in curia*, the informer shall stay.

THAT a corporation or body politic may sue in this court there is no question; only it hath been questioned, whether the successor should be charged with payment of costs; which was insisted upon in the Case of the wardens and company of weavers of *Newbury*, upon suggestion, that the wardens who begun the suit were factious, and commenced the same out of private malice, and the same was disliked by the company: yet the wise

PART III. chancellor, conceiving that all corporations might make the like suggestion, gave the new wardens a day after they were attached to pay the money, or otherwise to be committed. Churchwardens may also complain in this court, and their successors may prosecute, and are chargeable to pay costs. Husband and wife may complain for a wrong done unto the wife's estate to her disinherison, and if the husband die, the wife has election to prosecute or not; for if she will surcease, the defendant can have no costs; and if she will prosecute, they are to have costs from her prosecution; but if she recover, she shall have costs for the whole suit, for she was party from the first in any thing which shall be for her advantage; but if her suit shall be unjust, she did wrong but only from the time she was sole, for the former wrong was the wrong of her husband, which died with his person, as the *lord Egerton* directed in *Walkins' Case*.

BUT it were tedious to run through all conditions of persons that may complain; it will be a shorter course for me to shew, *who may not* be received to complain in this court; wherein this will be a constant rule, that no man shall be received to exhibit a complaint which cannot, by the rule of law, be compelled to pay costs, except only the king's attorney, or some which supply his place, and that merely for the king; which moved the *lord chancellor Egerton* to reprove the king's attorney for entertaining private men's suits as if they had been merely the king's. And it standeth with the honour and justice of the court to be careful as well to recompense the grieved innocent which is vexed with *false suggestions* (being a grievance which the court of parliament had of this court three hundred years together) as to punish the guilty pecuniarily or corporally; and therefore a *feme covert* cannot sue in this court, as it hath been often adjudged, and much debated in the Case of one *Floye*, of Southwark, who was vexed with a woman whose husband was gone to the East

East Indies, and she complained of wrong done after her husband's departure; yet it could not be allowed, because she could not be compelled to pay costs legally. But by collateral means the lord chancellor *Egerton* compelled one *Gwency v. Groin*, being a *feme covert*, to pay costs: she had caused divers to expend in appearing at her suit, who were dismissed with costs, for that she being a *feme covert* could not sue, and so was ordered to pay and discharge the costs, or to be whipped; so that *ecce modo mirum quod fœmina per brevem regis* holdeth not in this court. But the husband may complain against the wife; for so did *mr. Fowler*, as may be well remembered.* So a person outlawed, excommunicated, convicted in *præmunire*, or for felony, or for recusancy, cannot sue or prosecute any suit in this court until he reverse his outlawry, have his absolution, be received into the king's protection, or have conformed himself in obedience to the church. But these are more properly to be called *suspensions* of men's suits, until they be reformed, rather than absolute disabilities; and in these cases the court may order, that (notwithstanding the disabilities) the plaintiff shall be answered: for so did the last lord chancellor by *sir Francis Rayſche* to answer a bill of *sir Ralph Bingley*, being a person outlawed. But I suppose it was hard and illegal, and not to be done, unless that the outlawry or conviction of the plaintiff were gained by the defendant's means, on purpose to disable him. In like manner to these last named is it if a person which standeth forth all process of contempt in this court shall exhibit a bill against another, such a bill shall

- not be answered; for *frustra legis auxilium implorat, qui in legem committit*. And I suppose that a person convicted for a conspiracy, who hath had the villainous judgment, whereby he hath lost the benefit of law, cannot prosecute
- a suit here; and I doubt of it, if he were convicted by the sentence of this court.

PART III

§. IV. OF THE KING'S ATTORNEY'S SUITS.

Vide *Mr James Burrow's Reports*, vol. 4. p. 2554. Lord Mansfield quotes this passage relative to the attorney-general.

I HAVE handled the particular persons which exhibit suits in this court. It remaineth that I should, in the next place, treat of the king's ordinary suits, which are of two sorts; either by his attorney informing of himself, or by other men's relations; and by the king's almoner; the one being in criminal causes, the other in civil.

FOR the king's attorney, I have known it much questioned, whether any other of the king's counsel may not inform for the king, as well as his attorney-general; and it is true, that in Easter Term, 8. H. 8. it is ordered, that the king's solicitor shall not prosecute any further the merchants of the Steel-yard, till it was otherwise ordered by the council; and in the same Term the solicitor was commanded to sue out process against some which acquitted one *Blase* of a rape: so that it seemeth, that others of the king's counsel did prosecute causes for the king, as well as the king's attorney. But in 1. & 2. Jac. it was resolved by the court, that it belonged to the place of the attorney; and *serjeant Hale*, the king's serjeant, putting in a bill against *sir John Luson* was denied that privilege; for if a bill be put in by the king's counsel as for the king, there are no costs to be paid to the defendant, no fees for the prosecution; but in this case *serjeant Hale's* bill was dismissed with 30l. costs; it continuing in prosecution not above two Terms.

BUT because the king's causes are of great weight and labour to the clerks, and in all other causes that the defendants pay the plaintiff his costs, the lord keeper *Egerton*, Hil. 44. Eliz. made an order in the case where the king's attorney was plaintiff against *Harwood* and *Tooke*, that the defendants, who were sentenced at the king's suit, should always pay costs to satisfy the clerks which were for the king

king all their duties and fees; a fit order to be continued, but the same hath not been of late used. For in the great *Dutch Case* the king distributed a great sum of money amongst the clerks in recompence of their care, fees, and travail. But if defendants be acquitted, they can have no costs in ordinary course; but if it appear the king's attorney prosecuted the cause by another man's relation, the lords will and may tax costs to the defendants, which are dismissed upon apparent manifestation that the same was by a certain person prosecuted, and that he laid out any money in it. For in 1. H. 8. the lord mayor of London was compelled to pay the costs of some Kentishmen, against whom he had given intimation to the king's council for engrossing of corn. And so did the *lord Egerton* against *sir John Spencer* of London, although *sir Edward Coke* opposed it with all his power, and their costs were paid.

— BUT if there be a relator entered upon record, he shall pay all costs, yea and damages, as another man; but no man ought to have costs, unless he be a relator upon record; for surely the *lord Houghton* ought not to have paid costs to *sir Edward Coke* before he was entered relator, only he may have damages.

IF the king's attorney inform for an outrage, or some particular man be found to be much wronged, the court may give him damages, although he be no party in court; as it was adjudged in the *clerk of the market's Case*, who was ordered to make restitution to all those from whom he had extorted.

AND such as relate suits to the king's attorney have this advantage, that they are not tied to any strict rule of prosecution, but only to the order which the court shall make, or the lord keeper. A great question hath been stirred, Whether the king's attorney may prosecute a cause *virtute officii*, although the court dismiss it? and such an one was not long since prosecuted by the relation of *one Vaughan* against *Sherwell*. But surely the de-

PART III.

sendants were thereby wronged, and the court something dishonoured. For by the case before cited, *Port*, solicitor to *H. 8.* was ordered to surcease the suit against the merchants of the Steel-yard; and there is no reason but he being a party should be ordered by the judges, and concluded by their order, as well in point of prosecution as in the judgment, or final judgment.

BUT though it be a positive rule, that any man may inform for the king in the Star Chamber, yet in some cases a private person shall not prosecute, but the king's attorney. As about 13. *Jac.* a private person put in an information against some merchants in London who had the charge of the lottery for *Virginia*, upon the discovery of a notorious deceit in purloining all the great lots: although this was held a marvellous great deceit to the public, yet it was not thought fit that a private person should inform for this, it being a matter of state, which might trench to the overthrow of that plantation. And so if scandals be of the public justice, every man may not inform for it, for that it may sometimes be made more prejudicial to the state by the scandal, than the example will do good, as it was adjudged in *mr. Strewde's Case*. But surely it was a great inconvenience, when the king's attorney denied any men to inform for the king, and informed them to repair to himself; which if it should have allowance, would be a means to smother many offences in the kingdom, which by others' information (though out of malice) come to light. For the king's attorney's prosecution is but sudden, *flagrante crimine*; as in the time of dearth, to punish a few ingrossers of corn; in time of levellers rising, to punish a few inclosers of commons; but the great offence wearing old, then it is either forgotten, or by intercession closed up, that it venteth no more in the public: for the example in few giveth satisfaction to the multitude, and the end of that punishment is held to be, *ut poena ad paucos metus ad omnes.*

BUT

BUT let me be understood when I say, that the king's attorney is not tied to the strict rules of prosecution; for that is only to strictness of time, for saving men's dismissal; for he must make a good bill, in matter and form, as a common person; he must join issue, give convenient time for examination of witnesses, as a common person (the denial and restraint whereof was no small scandal to the justice of the kingdom in the *Dutch Case*); he must give warning for the hearing; and make as pregnant, manifest, and direct proof, as any common person whatsoever.

§. V. OF THE SUIT OF THE KING'S ALMONER.

—THERE is another kind of suit for the king, which is for the king's alms by his almoner, which is properly examinable in this court; and that is, where any goods of a *felo de se* or deodands are withheld from the almoner, which ought to come to him for maintenance of the king's alms, he may sue the persons which he doth suspect in the Star Chamber, if it be but for the value of twelve-pence. And it was a very necessary course, for that commonly those persons which prove *felons de se* are of retired conditions, and their estates rest in men's hands in secret; so that if there be not a strict means to sift the same out, when he is dead, it will hardly be discovered: and therefore the examination upon oath, which is in this court, is very necessary to help the king to his right. And in the recovery hereof, the king's almoner doth prosecute without charge, as the king's attorney doth in all causes for the king, paying no fees to any officer. But the almoner hath ever used to pay to every officer half the fees; as, to the attorney, twenty-pence for his fee, and six-pence for the copy of every sheet, whereof three-pence goeth to the

PART III. the clerk of the court, and the other three-pence the attorney retaineth to himself; and so in the like fees.

CONCERNING the *matter* of this suit, I have spoken before in the Second Part of this Treatise; and for the *end* of the suit, the same is not necessary to be punished by fine and imprisonment, as in all other cases, but to cause the party to render to the king's almoner that which is withholden: only if he shall not perform the order of the court, he shall be committed for his contempt; and the defendant shall likewise pay the king's almoner all his costs, to be taxed by the lord keeper, as in the cases of other persons. And if he shall unjustly vex any man, he shall not pay costs, unless it be by the special order of the court, for that he hath liberty to make inquisition to find out the king's right, for the maintenance of his alms. And the king's almoner hath the same prerogative that the king's attorney hath in filing his bill, and prosecuting his cause, at his will and pleasure, without the strict restraint of the rules of the court, whereby all other suitors are straitened.

§. VI. WHO MAY BE SUED IN THIS COURT.

HAVING shewed what persons may sue, and who may not sue, in this court; it followeth in order, that I should ~~show what persons may be sued~~ in the same.

AND to begin with the highest, it seemeth the king himself, who, as *Bracton* saith, cannot be sued but sued unto by petition, may in this court have a petition of right made unto him, requiring, that right be done unto the party grieved by his lords and great council. For so I find that the great *duke of Buckingham*, whom one Reporter calleth the mirror of all courtesy, in 2. H. 8. came to this bar, assisted with his counsel, and desired of the king

king and his council to be restored to the office of high constable of England, which was unjustly taken from him, as he pretended; and received order from the court to put his complaint in writing; and the next day he exhibited his bill, and forthwith the king's learned counsel were ordered by the court to put in an answer, and the duke shortly after ordered to reply thereunto; so that the king himself hath been defendant here as well as plaintiff.

AND in the next place are the earls and peers of this kingdom, who are in this court usually defendants. So was the *earl of Northumberland* in *H. 8.*'s time ordered to answer the bill, and at the bar made an humble confession of all things which were alledged against him, and submitted himself to the king's mercy, and prayed the court to be suitors for him, and especially the cardinal, the then lord chancellor, and many more of the same rank and order, both in the reign of queen Elizabeth and our dread sovereign king James.

CORPORATIONS and bodies politic are also made defendants in this court; and because the body politic cannot answer but by attorney, and so be made subject to the judgment (for the body politic cannot be sworn), I find in 2. *H. 8.* a command given to those that were of counsel with the mayor and commonalty of Norwich to exhibit their letters of attorney into this court; and nothing was so usual in those times as suits betwixt abbots and convents, and the mayor and commonalty of that place near the abbey, as I have shewed in the Second Part.

AND of later times the mayor and commonalty of London were defendants to a suit in this court, and made parties thereunto. Aliens and strangers may be made defendants in this court; so were the merchants of the Steel-yard and the Hanse towns in *H. 8.*'s time.

AND in 2. *H. 8.* letters were sent from the king to the lord chancellor, that the court should give faith to whatsoever should be delivered by the prior of St. John's

PART III. of Jerufalem, who delivered the king's pleasure, that the lords should call before them the abbot of the Cistertians, who being a stranger was come into England to visit that Order; who being called, and often heard, was in the end commanded not to visit here. And the fresh prosecution of the merchant strangers for transporting of coin cannot be forgotten.

A *feme covert* shall be defendant in this court, and her husband shall pay costs and damages for her, as it was adjudged in *sir Henry Townsend's Case*, although much opposed by the judges; for that in civil causes, they said, the husband's estate should be charged by the wife, but not in criminal causes, for he shall not suffer in person for his wife's crime. But surely the case was justly over-ruled against the judges by the labour of that wise lord chancellor, for costs and damages are civil parts of every cause; and if an action were brought against a wife for a battery, and damages given, the husband at the common law shall pay it, for two reasons; the one, for that it was his folly to take such an unruly wife; the other, for that it is the husband's duty to correct her ill manners, as appeareth by the writ *de securitate pacis*, in Fitzherbert's *Nat. Brev.*

THE poor people shall be made defendants in this court, for many times they are made instruments to do the greatest offences, but they shall not be admitted to sue *in forma pauperis*. If there be any able persons joined defendants, upon their oath they ought to be admitted, and have counsel assigned unto them; which is one of the favours usually done by the lord chancellor or lord keeper. All persons disabled by law may, notwithstanding, be made defendants in this court, as well as at the common law, for they cannot plead their own disabilities, except persons attainted of felony or treason; and *Empson*, being a prisoner in the Tower, was enforced to give answer in this court, but not personally called forth for that purpose. And in the end of the reign of queen Elizabeth

Elizabeth a man having a heavy sentence in this court for gagging a woman in Fleet-street, with intention to have robbed her, confessed himself to have committed treason at the bar, to prevent the execution of the sentence of this court; but this sentence was first executed, and he was afterwards indicted, arraigned, and executed for the treason.

BUT it is usual, that an infant under years of discretion is not charged in this court with an offence; but upon view of his tender years, being brought before the lord chancellor, he is discharged. So likewise an ideot, or a man *non sanæ memoriæ*: and the reason which is yielded is, for that the one hath not discretion to discern the weight of an oath, and the other can yield no reason or answer to the court. But yet methinks the reason is not prevalent, for a body politic cannot be sworn, and yet shall be made party; much more ideots and infants; for the proverb is, "that children and fools will tell true." But the true reason is, for that the court will not be swayed with the testimony of such person to accuse others; and the examples will do little good in the Commonwealth to see a boy punished; for otherwise, by the law, an infant may be a felon, *quia malitia supplet ætatem*, and shall be punished for any contempt or contumacy, so that he be above fourteen years of age; and such an one may well answer for himself in this court. Besides, such persons are usually employed to do unlawful things; and many dissemble madness and folly; and therefore the court ought to be tender how such persons are discharged.

BUT if an infant be above the age of fourteen years, and be a party in court, he shall be liable to the sentence; for by the common law an infant is bound by every statute law, if he be not expressly excepted. And so young *Wiseman* was sentenced, being a party to whom his father made a fraudulent deed to deceive creditors. And I remember that I, being of his counsel, urged much that his fine should be spared for his infancy, although the deed

were

PART III. were damned: but the lord chancellor answered me, that an infant should be punished in redisseisin by fine, and imprisoned; and so was *Wiseman* punished in that case. The churchmen are not free from the sentence of this court; witness *mr. Crosse*, and before him *Peter Brereton*; both which were ordered to be deprived, and *Crosse* was deprived accordingly. Neither are persons of decrepid age spared from answering here; but some which stood in contempt, have been brought up in litters to make answer.

So then no decree or estate, no sex, nor age, nor condition, are privileged from making their appearance or answer in this court; no, not burgesses of the parliament; for so I find in 11. H. 7. one *Boughley*, being there called a burgess of the parliament, made his appearance, and was enjoined to appear *de die in diem*.

THE record is direct, yet L. do not dispute the privilege, for that I have heard that it hath been there determined, that the service of a *subpœna* hath been a breach of their privilege; which is strange, for that it restraineth not their liberty. Neither is any place in the king's dominion exempt from this seat of judgment; neither Portmen, or Stannarymen, as I have shewed in the Second Part of this Treatise.

§. VII. OF THE PROCESS WHEREBY APPEARANCE IS REQUIRED.

THUS having shewed who may complain, and against whom complaints may be exhibited in this court, it followeth, in the next place, that I should shew the means, how delinquents should be called into this court to make their appearance, but that there ariseth a question in the way, Whether any man be called before a bill be filed against him *in formâ juris* upon record? for the bill is *origo et caput*

caput sessæ, as it is said in *Littleton's Case*; and the words of the *subpæna*, as they say, import the bill to be filed before the writ granted; for it is, *quibusdam certis de causis coram nobis et concilio nostro expositis*; which is matter contained in the bill; and therefore the lord keeper *Egerton*, in his settled orders, made for the direction of the court, did enjoin bills to be filed before any process were awarded; which he did upon certain information, that many solicitors who lived in Wales, Cornwall, or the farthest parts of the North, did make a trade to sue forth a multitude of *subpænas* to vex their neighbours; who, rather than they would travel to London, would give them any composition, although there were no cause or colour of complaint against them: which strict rule breeding a great inconvenience, for the haste in putting in the bills, made the proverb true, *Festinans canis cæcos parit catulos*: he therefore gave liberty for any man to amend the bill before the defendant's appearance, so that it contained the same matter in substance; but this bringing a double charge to the plaintiff, who sued for the king and Commonwealth (and therefore is to have all favour and ease which may be), was within the space of seven years reduced to the course of former times, to have the process before the bill, so that the bill were filed at the return.

I SHALL therefore apply my course both to the former and antient times, and also to present use, and handle the awarding of other process before the filing of the bill. And therefore, in antient times, when complaint was made either of some notable outrage, or fraud to the king, the lord chancellor or council (sometimes the king) by letters missive commanded the delinquent to answer in the Star Chamber. Sometimes any of the council, to whom the complaint was made, sent for the offender, and took him by recognizance to appear in the Star Chamber; which course is yet usual. Sometimes the lord chancellor sent a serjeant at arms to admonish them to appear; some-
times

PART III. times a messenger of the king's chamber served the privy seal; sometimes, a *subpœna* was awarded to be served by the party and his servant; and all these kinds of summons or original process I find in the records of *H. 7.* and *H. 8.* And I find in those times, upon a default of appearance in contempt of the king's letters missive, or the summons of the serjeant at arms, the next process was a proclamation of rebellion *sub pœnâ ligeantiæ*, and in the other, an attachment.

AND no doubt but the lord chancellor or lord keeper may at this time attach the person by his messenger, or serjeant, and detain him until he find good caution to appear; which in times past every defendant did upon his appearance: but that is unfit to be done in every private cause, unless the non-appearance beget suspicion that he will hide himself. But the next question is, Whether this ordinary process lie against all sorts of people? for the great peers of the realm do deny to appear upon the ordinary service, but require letters of summons, like letters missive, from the lord chancellor or lord keeper, which certainly, for all latter times, have been yielded unto for their dignities. And yet I find in *H. 7.*'s time a privy seal was served upon the *earl of Kent* to appear in this court; and in 3. *H. 8.* the *lord of Abergavenny* warned by the serjeant at arms to appear; and in 11. *H. 8.* the *lord Ogle* was committed for a contempt in breaking a privy seal directed unto him; whereby it appears, that a privy seal was in those days directed unto him, and divers lords bound over to appear by recognizance; so that I doubt of the antiquity of this grace (if it be so esteemed); the king's broad seal being as honourable as the lord chancellor's letter, but only that the other is a more singular course, differing from the common sort of people.

THE privy seal, or *subpœna*, for appearance (which I take to be all one) is of one and the same form to all, except only to the inhabitants of the Cinque Ports, which is thus: *Jacobus, Dei gratiâ, &c. Quibusdam certis de causis*

causis coram nobis in concilio nostro propositis, &c. tibi præcipimus, firmiter injungentes, quòd omnibus aliis prætermiſſis, et excusatione quâcunque ceſſante, in propria perſona tuâ ſis coram nobis et concilio nostro apud Weſtmonaſterium in Oſtab. Michael. proxim. futuri, ad reſpondendum ulterius quod per nos et dictum concilium noſtrum conſideratum fuerit in hac parte; et hoc ſub pœnâ centum librarum; et habeas ibi hoc breve. Teſte, &c. And upon the back of this writ is indorſed the plaintiff's name who proſecutes the ſuit, "*J. D. ſequitur hoc breve;*" by which it appeareth, that the ſuit is the king's, and the grieved party but the proſecutor, for otherwiſe his name and cauſe ſhould be ſpecified in the writ, as in all writs at the common law, *viz. Præcipe A. B. quòd reddat C. D. 20l. quas ei debet, et injuſtè detinet, &c.* And the form of the writ to the Cinque Ports is in this manner: *Jacobus, Dei grâtiâ, &c. prædilecto et fideli ſuo Eſtuardo Domino Zouch, &c. guardiano ſive cuſtodi Quinque Portuum ſuorum, ſive ejus locum tenenti, ſeu deputato ibidem, ſalutem. Quibæſdam certis de cauſis coram nobis et concilio nostro propositis vobis mandamus, quòd ſub ſigillo veſtro detis in mandatum C. B. et J. B. quòd omnibus aliis prætermiſſis, et excusatione quâcunq; ceſſante, in propriis perſonis ſuis ſint coram nobis et dicto concilio nostro apud Weſtmonaſterium in Oſtab. Sancti Michaelis proxim. futuri, ad reſpondendum ſuper hiis quæ ad proſecutionem C. J. ſibi objiçuntur tunc et ibidem, et ad faciendum ulterius et recipiendum quod per nos et dictum concilium noſtrum conſideratum fuerit in hac parte; et hoc ſub pœnâ centum librarum; et quòd habeant ibidem mandatum noſtrum prædictum. Teſte meipſo, &c.*

THERE was another uſual form of writs, in which was contained a clauſe *quòd ducat ſecum* all ſuch others as were his ſervants and actors of any outrage; but the ſame is now out of uſe, and the proceeding afterwards ordered by the court: but if any of the writs be left at the houſe

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of the defendants, so that he come to his house in reasonable time before the return, he must appear; or if he have notice that the same was left there, and also when it was made returnable. But surely it is not sufficient that the party have notice of the label, unless at the time of the service the writ be shewed sealed; for it is the seal which requireth the obedience: and therefore if the seal be shewed, and a ticket of the day of appearance left with the wife or servants, it is a service sufficient; for it may be the delinquent will keep himself from sight; and therefore in times past the process was served in market, or in church; but now it is held a great offence to profane the church by service of process, that being a sanctuary where no man's devotion should be interrupted. But (under correction) I must cleave to antiquity, and hold it no offence to serve the process of law (if *Fortescue* say true, that *lex est sanctio sacra*) in a holy place. For it appeareth upon record, that these processes were usually served there in *H. 7.*'s time, when the church rather abounded with superstition than it wanted reverence or respect, especially if the party cannot well be met in all other places.

But to proceed: Upon notice given of the process, if the defendant do not appear, the prosecutor, or some other for him, must make oath (which was in times past called the certificate) of him which carried the process, upon whose testimony an attachment is now awarded by the clerk of the court. But I have shewed in the First Part of this Treatise, that all original summons or processes were granted anciently by the lord chancellor, or the court, and so every attachment to call the party to answer his contempt; at which time I find, that upon slender testimony, or affidavit, attachments were awarded: as, that he which certified received a letter that the *subpœna* was served; which was not greatly inconvenient, for it was awarded to call the defendant to answer; and if at his coming he could excuse himself, that he had no notice, nor was

was sufficiently served, he was discharged of his contempt: for so was the bishop of Norwich, 15. H. 8. upon his oath discharged; and we know the heaviest censure is allowed to draw the defendant to answer. But of affidavits I shall speak in the proper place. And as an attachment is awarded against every ordinary subject for his default of appearance, if the peers of the realm will not appear upon the summons served upon them by the letters from the court, or by writs served upon them (of which there be many precedents, and one to the earl of Northumberland in 7. H. 8.), in case of contempt a privy seal *sub pœnâ ligentia* was awarded against them, and upon their appearance they were committed; which process is the same with a writ of proclamation used instead thereof. And in 6. H. 8. an attachment was awarded against the abbot of Peterborough, who was a lord of the parliament; which attachment is awarded for the most part to the sheriff of the county where the party is commorant, and the form of every attachment is in these words:

Jacobus, Dei gratiâ, &c. Vic. Midd. salutem. Præcipimus tibi, quòd attachias H. L. ita quòd eum habeas coram nobis et concilio nostro apud Westmonast. in Oci. Sancti Michaelis prox. futur. ad respondendum nobis et dicto consilio nostro tam de quodam contemptu nobis per præfatum A. illato (ut dicitur) quàm de aliis sibi tunc objiciuntur; et ad faciend. ulterius et recipiend. quod per nos et dictum consilium nostrum consideratum fuerit in hac parte; et hoc nullatenus omittas; et habeas ibi hoc breve.. Teste meipso, &c.

IF the sheriff shall not apprehend the body, but return, that he cannot be found, then a writ of attachment with proclamation is awarded, the tenor whereof is, *Jacobus, Dei gratiâ, &c.* But if the sheriff attach him, and have him in prison in the gaol, and he be sick, or at the time of the writ delivered have him in execution in the prison; in the one case he returneth, that he is *languidus*, that he

PART III. cannot bring him; and in the other he returneth, at whose suit he lieth in execution. Then the court will award an *habeas corpus* to bring the prisoner up; and then the sheriff bringeth him to the court, and the lord keeper (if he be in execution) delivereth him over to the warden of the Fleet, where he lieth, charged as well with the execution as to answer the cause in this court; and in the other case, he either punisheth or remitteth his contempt. If the sheriff fail in his duty in not making his return, the court usually setteth a fine upon him of five pounds or greater, either for not returning the writ, or not bringing the body according to the return; which fine is increased every day the sheriff faileth of his duty, upon day given him by the court to bring in the same. But if the sheriff shall at any time return, that the person is not to be found, when in truth it shall appear that he hath been in his company after the writ delivered unto him, then the court will commit the sheriff to the Fleet. And it may be noted, that strangers not being parties nor present in court are not to be committed, but first to be attached; but the sheriff, being a minister of the court to serve the process, is intended to be always present in the court; it being often used in the time of *H. 8.* that they were commanded all to be sworn in the court at some special time; and by the statute-law they are to have deputies in every court at Westminster; so that the sheriff, for any apparent abuse, is immediately committed, or day given him to shew cause why he should not be committed.

BUT if the defendant cannot be apprehended, nor will come in upon proclamation, then a commission of rebellion is usually awarded; which is directed to as many as the prosecutor will name, giving them charge and authority to apprehend the body of the defendant as a rebel; and the commissioners may break into any house where the defendant is, to attach him; and either send him to the next gaol, or bring him to the warden of the Fleet. For the com-

commissioners have a writ of assistance included in the commission; and the defendant, upon his coming in, shall pay all the plaintiff's costs, if the party defendant be not committed. But if he be committed for his contempt, the plaintiff shall not have his costs till the end of the cause, unless by special order. On the other side, if the plaintiff shall unduly sue forth process of contempt, and attach the defendant, he shall pay all the defendant's costs: and one *Watts*, about 2. Jac. was grievously sentenced for attaching one *Camden*, being an old man, upon a commission of rebellion unduly sued forth. So likewise, if the commissioners in a writ of rebellion shall molest the defendant, and refuse special bail for his appearance, they shall pay his costs, and be punished; as it was adjudged in *sir Hugh Portman's Case*, Trin. 40. Eliz. and the tenor of the commission of rebellion is, the commission of rebellion.

But if the defendant can by none of these courses be brought to answer, then the court sendeth a serjeant at arms, who in times past was used to make the first summons; and he hath power to search in all places for the defendant which he shall suspect, to apprehend him and send him up. And in the same form in the time of H. 8. an attachment was awarded to the sheriff of Cumberland to take the power of the county and to attach one *Cleyter*, under the pain of 500l.; and the like to the lord *Dacres* of Giffland, being lord warden of the marches of Scotland, to attach divers of the *Ogles*, under the pain of 1000l.; so that howsoever time hath been settled a form of ordinary proceeding, yet the same exceedeth not the ancient course. But now the prosecution is gradative, which was heretofore often used at the first, and so surely may be at any time upon special reasons; the end of all these courses being but to bring the defendant in to answer. But if a person stood out many contempts, in H. 8.'s time I find, that when he came in he was fined for his contempt; which is now in use upon the appearance, only he is committed, and, if he

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have stood long in contempt, not easily enlarged till he hath made answer, and he is examined to the bill put in against him.

§. VIII. OF THE FORM OF COMPLAINT.

AND now, because in former times when the party appeared the plaintiff was commanded to put in his bill; and in these times upon the appearance the bill is to be ready, for otherwise the clerk of the court taxeth the defendant's costs for his vexation (which is the mere permission of the lord chancellor, or the lord keeper, who for his ease parteth with the honour, and may at his pleasure add unto or diminish those costs), I will entreat of the bill.

THE bill must be brought engrossed in parchment, and filed with the clerk of the court, and by him indorsed; and of later times the day when the same is received, is indorsed; which grew upon great reason, for that many questions rose upon the time of filing the bill, either upon clauses of the general pardon, whereby all offences were excepted for which any bill or information was depending in the Court of Star Chamber at any time during the session of parliament; in which case if the bill were not filed, although process were sued out, yet the offence was pardoned, and therefore the day of the filing being indorsed, it took away all question; or for ascertaining of any matter, as where it is suggested in the bills. But an offence committed in the month of May *last past*, before this indorsement used, was uncertain; but now by the indorsement it is ascertained, as hath been certified by all the judges of England. It must also be subscribed under the hand of some learned counsel, which, as I have be-
fore

fore said, were ever in antient times appointed by the lord chancellor in every cause, and their names entered upon record; which was done to the end that frivolous suits might not be common, and that legal form might be used by able and considerate men, who, attending that bar, would for their reputation be careful that nothing should pass under their hand unfit for the dignity of that court. To which purpose an order afterwards was conceived in the lord keeper *Bacon's* time, that no bill should be received unless it were under the hand of a double reader, or some of the king's counsel; which also is now out of use; the court perhaps finding that curiosities of form was not so useful as diligence and plainness for that presence: but sure the first use was very convenient and fit. That grave lord keeper *sir Nicholas Bacon*, to adapt all things to the judicature of this court, and to take away prolixity of pleading, did order that no bill should contain above fifteen sheets of paper; and these were by the *lord Egerton* after ordered to be written fifteen lines in a sheet, and not wastefully, the lord allowing much as he did in all things, so in that especially to the orders of his predecessor *Bacon*; often saying, that a man might be charged with more in fifteen sheets than he could answer in a hundred. And surely this was very convenient both for the judges and subjects: for the judges, for that in long and tedious bills there are so many offences contained, that it is troublesome to the lords in their sentences to distinguish them, and the proof to them much perplexeth their memories; which being reduced to some shortness, will much ease them: for the subjects, for that many persons are charged with many offences, and some only guilty; the residue, although innocent, cannot by the course of the court have their costs; and many are unjustly vexed by the colour and pretext thereof; which if bills were refined to a more indifferent length, would not be so frequent as it is.

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AND thus much for the *filing of the bill*, which must always be done before any process of contempt can go against the defendant for non-appearance: For the *matter* of bills, I have already declared in the Second Part of this Treatise, there only resteth the *form* of them: and it is to be observed, that all bills in this court are to be directed to the king's majesty, and in the end the offence is to be laid down truly, certainly, and legally. First, the inducement or occasion, how it rose; either the title, in case of fraud, forgery, or perjury; or, in some, for the lawful possession; or, in aggravation to the offence, the long continued inheritance. Next, the crime itself must be set forth, with convenient certainty of the time, place, and person. Lastly, a process must be craved against the defendant, returnable before the king and his council.

FOR the inducement, howsoever some of the judges have delivered their opinions, that the title may not be examined in this court, and therefore such inducement is unnecessary in a bill, and not to be answered unto; yet if deliberate consideration be taken in this case, the weakness of the opinion will easily appear: for no man will deny but perjury was ever examinable in the Star Chamber, and especially such perjury whereby a man was disinherited; and that before the stat. 5. *Eliz.* as will appear by the proviso in the statute. Then, if upon a trial at law, by a false oath my possession be taken from me, without proving any lawful title; as for example, the question is, Whether a deed made by me of land were absolutely or upon condition, and for non-performance my interest determines, shall not I alledge that it was absolute, and prove it? and, Can this perjury be determined without the determination of the title? or, Will any man think, because this will determine the title, therefore it shall not be alledged in this court? God forbid!

AGAIN, a riot is charged with some outrageous attempt in taking away any corn or hay with force or multi-

multitude; is it not a great offence, if this were taken from my possession, which was long and quietly settled, either by judgment in the king's court, or that I was in by descent, without colour of title by the other side, that if the party which took it had good title to the land where the corn grew, and so the possession, yea and the title fitly examinable? and yet the force is punishable, notwithstanding he had good title.

IN like manner, if a jury shall be charged to have given a verdict by imbracery or corruption, is it not a greater offence if the verdict were given against the evidence than with the evidence; and yet both punishable.* And yet it is not denied, but that a man may alledge the verdict to be against the evidence; and yet both punishable, it being in the nature of an attain. But, under favour, not so few as forty juries have been punished in this court for perjury in their verdicts within fifty years, and yet now leave will not be given to alledge that they passed against their evidence; which I fear emboldeneth corrupt juries more in our age than ever was in former times.

I COULD alledge many examples to this purpose, to manifest how fitly title is to be alledged to induce the matter, and to aggravate it; but to leave the inducement (which a learned man will set down as briefly as he can) and come to the charge, that the crime must be set down truly; for if one offence be charged and another proved, there is no bill to warrant a sentence. So was it in the *lord Digby's* Case against *Meeres*, where a deed was charged to be forged, by which *sir Walter Raleigh* was pretended to lease to *Meeres* one parcel of land lying near *Sherborne* castle, and the deed proved contained other lands; and so adjudged naught. So in 40. *Eliz.* one *Hayton* preferred a bill against *Baddam* for forging a deed of his goods to *Baddam* and *Love* by inserting of an (I), and so to make it over-reach a deed made to the plaintiff; and it fell out in proof, that the deed was made to *Baddam* alone, which
could

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could not be one with the same deed intended by the bill; so was not held true, and the court could not proceed to sentence.

AND of this sort there are infinite examples, for that these exceptions must of necessity be allowed at the hearing, for that it cannot appear before the hearing; for the bill is good if it be proved.

AND this charge must not only be laid truly, but it must have convenient certainty, whereby the defendant may give direct answer; for if the offence is not certainly laid, the party is not compellable to answer; and therefore *Reynolds'* complaining against *Vernon* for a libel, which the bill alledged was contained in a schedule annexed, it was adjudged no charge, for that the matter ought to be contained in the bill; and although in offences of extortion and bribery, it be a good charge to say that the defendant hath taken such a sum from *A.* and *B.* and *C.* and divers others, not naming all, to avoid infiniteness; yet so that proof be made of those that be ~~alledged~~, many others may be proved, and the charge good. Yet this must be observed, that the offences proved must be *ejusdem speciei* not *heterogeniæ*, as it was in *sir* ——— *Bingley's* Case. And there must be proportion betwixt those that be laid and those that be proved *numero et magnitudine*; as small offences must not be laid, and great ones proved; or two or three laid, and twenty others proved; for so no man can be able to defend himself. And as there must be a particular certainty in the matter, so there must also in the time and in circumstances, as in place and person.

• AND first for time, it is convenient for order's sake, that a time should be alledged; and therefore in the *2nd* *Morley's* Case against *sir Henry Colt*, the offence was alledged to have been committed within the instant month of September, and the bill was indorsed in October, and no other time alledged in the bill; and so, for want of time, the bill was held not good. But in *M. 44. Eliz.* there

there was a Case wherein one *Hogg* was plaintiff against one *Phinian*, for a practice in *Phinian* to cozen *Hogg*, a poor vicar. The practice was laid 38. *Eliz.* and the execution was afterwards in the 29th, which was impossible; but the bill concluded, that all the offences were committed since the last pardon; which was held to be sufficiently certain, and the other time laid impossible was void: and that clause was omitted in the *lord Morley's* bill; which if it had not been, was held to be good.

AND as in time there must be convenient certainty, so must there be a place laid in the bill, either parish, village, or town, where the offence is laid to be done. As for example, one *Lewis*, of London, complained for a riot committed upon his person in *Cole-harbour*, but did not shew where *Cole-harbour* was, in what county or city; yet because it was a known place, it was held to be certain enough for the place. And for these two circumstances of *time* and *place*, the court of late times is not troubled, for that the *lord Egerton* in *Nich.* 3. *Jac.* made an express order, that no man should take exceptions at the hearing for such uncertainty of form, wherein he might have excepted by way of pleading.

As for the certainty of *person*, he that shall be charged in this court, must be charged by his true name; for if *John* be charged in the bill, *Thomas* cannot be punished, although he made answer; for so it was adjudged in *Vaughan's Case*, *Hill.* 2. *Jac.* where process was prayed against *Rogers* and *Alice* his wife, and his wife's name was *Ann*, and so she answered; and it was held no answer to that bill. So the answer of *Penelope countess of Devonshire* to the charge of a bill where she was called *Penelope lady Rich*, she being then separated from *lord Rich*, was held no answer, in *sir Richard Champenon's Case*.

BUT a riot is well charged to be committed by *J. B.* and three others unknown, for the penalty only goeth to *J. S.* and the others are not hurt till they are named; and when

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when they are discovered, by a rule of *lord Egerton's* they may be inserted into the bill at all times within one whole Term after the bill exhibited, yea and afterwards by order of the court, when some defendants are discovered by examination of the others.

I HAVE further said, that it must be laid down legally; wherein I would not have it understood that every punctilio must be stood upon; for there be divers orders straitly inhibiting such strictness of form; for which there is a notable order entered of record, upon conference with the judges in 32. *Eliz.* As, if I charge the party to have committed an outrage in the night, with a multitude of people armed, hurting and wounding divers persons; although I do not say that it was riotously, as I ought to do in an indictment, yet it was adjudged a good charge in *Reynolds' and Vernold's Case*, 10. *Jac.* for that the matter which made the riot was alledged in other words. But in the *earl of Northumberland's Case* against *Burr* for forging and publishing a deed, the publication of the forged deed was proved against the defendant; yet because he was not charged to have published it knowing it to be forged, which makes the offence in the publisher, and is the apt legal charge, the defendant was dismissed; but, upon a new bill, was afterwards sentenced for the offence,

So in a charge for conspiracy, if it be not laid that they did agree falsely and maliciously to indict the party, it is no conspiracy; for if it be maliciously, yet if it be true malice, it is a good informer, although a bad judge. And if it be false, yet if it be not malicious, it is not punishable; for circumstances may give the indictor good cause to believe it to be true; as it fell out in *Roche's Case*, who was indicted for the death of one *Solm*, whom *Roche* struck, and in short time after he died: and although he died not of that hurt, yet had *Solm's* son, who indicted him, just cause to believe it to be the cause of his father's death. But I shall not need to extend this part,

part, for that the exception to an illegal charge in a bill is fitter to be taken by pleading than at the hearing, and then the judges upon hearing counsel will determine of the same.

I NOW draw to the *conclusion* of the bill; where the plaintiff must be careful that he pray his process against all those that he will make defendants; and that by their right names: for if he shall charge a man, and serve him with process, and not pray process against him, he is to be dismissed with costs; as it was ordered in *Hutton Fowler's Case* in 36. *Eliz.* and many more since; and the process must be prayed returnable in the proper court, which is *coram rege et concilio*; for otherwise, how shall the defendant know where to make his appearance? And the process must be prayed as it is directed, or otherwise the bill doth not warrant the process; of which there must be due regard had, otherwise every cause will be confounded in another; and therefore the process must in all be as the bill. For if the bill be in the name of *Grant*, a process at the suit of *Grant* is not warranted by that bill; and a bill at the suit of *J. S.* doth not warrant a process at the suit of *J. S.* and *J. N.* as it was held *Hill. 3. Jac.* betwixt *Wright* and *sr Anthony Felton*.

AND thus much for the bill, and the filing thereof, which is ordered to be without fees; only two shillings is paid for the warrant of the process, if it be not sued out before the bill filed, and no other fee taken for any other warrant upon the bill.

§. IX. OF THE DEFENDANT'S APPEARANCE.

THE bill being duly filed, which the plaintiff may perform by himself or his attorney, the defendant is now to make his appearance, which (without special favour) he ought

PART III. ought to do in person; and that appearance may be made upon process, or without process: upon process of *subpœna*, letters missive, or recognizance, as I have before alledged: without process, when any person of worth or honesty hath a scandalous bill filed against him, having notice thereof, he may appear *gratis* to purge his reputation; and yet he shall have his costs; as it was adjudged in the Case of *sir John Luson*, who appeared to *mr. serjeant Hale's* bill, and had costs.

OR, if any man have notice that process is gone out against him, he may tender himself before the day; but the plaintiff in that case cannot be compelled to put in his bill till the return of the process: but if process be served upon a man in which his name was mistaken, he need not appear at all, if he please. If that the appearance be not made until after the return, there hath been usage, that the defendant should pay four-pence for every day after the return, and before any attachment awarded for his *post diem*; which money was wholly and solely employed to the poor man's box; and how diverted of late I know not, yet surely not to the antient use. And for the entry, or recording of the appearance, every man payeth two shillings; that is, one shilling to the clerk of the court, and one shilling to the usher.

IN former times this appearance was always taken before some lords, and either in court or council chamber, or in the lord keeper's house; and of latter times before the clerk of the court, who went sometimes (very rarely) to take the appearance of the defendant; for which he hath ever had the fee of ten shillings; the gaining whereof hath caused the under-clerk to attend all persons of any eminence, to take their appearance at their house or lodging; which is a great derogation to the dignity of this court, and fit to be looked unto, lest in short time it breed contempt and much dishonour thereunto. And it is to be noted, that although the plaintiff who is the prosecutor
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be disabled by outlawry, excommunication, or any other means in the defendant's knowledge, yet must the defendant yield his obedience to the process, to attend the court, until he hath pleaded that disability, and the same appear unto the court upon record; at which time the king's attorney may, if he please, supply the plaintiff's defect, and prosecute the cause for the king; and if he shall fail to appear, an attachment shall be awarded before the defendant's appearance.

THEN must he enter into a bond not to depart without license of the court, which, in antient times, was done upon every appearance, and in those days most commonly with sureties to appear *à die in diem*; which was long time used, but now never used but upon great cause, and the special command of the lord keeper, or the court; but now his appearance is received, paying ten shillings for the fees of the attachment. But it happens many times, that the defendant cannot appear by reason of age, sickness, impotency, or imprisonment, necessary employment in the king's service, or such-like lawful causes; all which, if faith be made of it by oath, doth amount unto an appearance; and doth not only excuse the contempt, but, upon his request, he may have a commission to take the answer or examination in the country, directed to commissioners; which were at first especially appointed in all counties by the lord keeper; but, after, indifferently chosen by the parties, and time and place appointed, and agreed upon, the manner whereof I shall declare hereafter in their places. Sometimes the defendant doth appear after attachment awarded; yet upon oath, that he was hindered by waters, or any casual misfortune, or that he had not notice of the *subpoena* till after the return, or not in such due time as he could prepare himself for his journey, if he live in remote parts, his contempt shall be excused. These excuses were heretofore allowed by the
lord

PART III. lord keeper, lord chancellor, or the court; but of late, bonds are taken of him not to depart without license, which lie in court without use; only the clerk's benefit for taking them.

THE appearance being entered, the defendant must now retain his attorney, who must take the record of the bill from the file, and copy it for the client, which the clerk of the court ought to deliver: but if no bill be then filed of record, then is the defendant to have his costs for his travail, which, in former times, were taxed by the lord chancellor, but now by the clerk of the court; which are allowed to all persons, yea even to those which are *in formâ pauperis*: for as the *lord Egerton* used to say, although they paid no fees, yet they must pay for victuals and lodging. Yet is not this rule so general that it holdeth in all cases; for in the king's case, the defendant is to attend for the bill by the king's attorney, or almoner, and cannot be discharged without their assent.

THE copy of the bill being made, the defendant is to pay for the same twelve-pence for every sheet, whereof six-pence the attorney is to pay to the clerk of the court, and six-pence he is to keep to himself, by the established orders of the *lord Egerton* and the judges; and by the same, ordered the attorney to subscribe the copy to agree with the record, and put his name, as a testimony thereof: and the client nor attorney shall be compelled to attend the clerk of the court for his subscription, as formerly was used; for which the clerk had always two shillings; but since these latter orders it is wholly left, to his great prejudice much more than the value of his subscription, by the abuse of under-clerks in their false accounts for copies.

THE bill thus copied by the defendant's attorney, it is then, or should be, carried to counsel to draw answer; who were heretofore always in all cases appointed (as I have said) by the court; but now of late (such is the abuse),

a careless answer is drawn by an ignorant clerk, and more simple counsellors hands gained unto it, for half fee, and so the court filled with frivolous and insufficient pleadings.

§. X. OF THE DEFENDANT'S ANSWER.

HAVING now furnished the defendant with a copy of that which is suggested against him, and sent him to his counsel to be well advised what answer he shall put in, I will first shew how the answer is to be put in, in general; and in the next place shew, that defendants do either answer in court, or by commission in the country. By ordinary course the defendants have eight days to frame and bring in their answer into the court; unless in some cases, by reason of the weight of the matter, tediousness, or intricacy, or shortness of the Term after the return of the process, the court will shew grace upon motion, in giving longer time. But if the defendant's counsel find that the bill containeth matter of title, which they cannot answer with safety without sight of the defendant's evidence or writings; then, upon oath made that his evidence or writings are in some remote part from the court, he hath time given him to answer until the next Term of course by the clerk of the court. But counsel being to frame the answer, which cannot be done without conference with the client, and mature deliberation, the defendant must either put in a plea, demurrer, or an answer, or (as *serjeant Hale* did) an answer having all those titles; and those are not tied to any certain proportion, but are left to the discretion of the counsel, for that occasion may be sometimes to draw them shorter, sometimes longer. But if it shall be stuffed either with scandalous matter, as the committee to whom it is referred shall assess—who hath power

PART III. so to do by an order of the court to be taken in *M.* 35. *Eliz.*—but if there be scurrilous or scandalous matters, the defendant shall be committed, yea the counsel whose hand is to the answer (as none can be received without a counsellor's hand) shall be grievously rebuked, and sometimes ordered that their hands shall not at any time after be taken to any pleading in this court, yea and sometimes committed to the Fleet; of all which examples are innumerable.

A PLEA is some matter of record, and, as the lawyer saith, containing matter *dehors* (out of) the bill; which being alledged, barreth any further proceeding in the cause. And this may be of divers sorts, either to the disability of the person of the plaintiff, to the jurisdiction of the court, or to the matter of the charge.

A PLEA to the disability of the person, is either an outlawry or excommunication, and conviction of felony, *præmunire* or recusancy, conspiracy or rebellious contempt, in the same court; in all which cases, the defendant is to plead the conviction truly; and in outlawry or excommunication he is to annex the same *sub pede sigilli* of the several courts where the plaintiff is convicted, and affix them to his plea; and these are accepted without oath, because the seals give faith unto them.

BUT it hath been a question, What seal should be annexed to the outlawry? And the lord chancellor Egerton would allow none but the great seal, and the whole record of the outlawry should be pleaded; but the lord chancellor St. Alban's allowed the ordinary seal wherewith writs of *capias utlagatum* are sealed, with the *capias utlagatum* only annexed: and the lord Egerton's reason was, because the plea was in delay of the plaintiff. But in all other cases the defendant is to put in his plea upon oath, to give certainty that it be not feigned; and in all he doth demand judgment, whether the plaintiff shall be answered; and in all these cases the plaintiff is barred till he reverse
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the outlawry, and procure absolution, and in other cases set himself straight: and by the lord Egerton's rules, if he do not the same within two terms, he shall be dismissed with his costs.

A PLEA to the jurisdiction of the court is, when a person living in the Stannaries or Cinque Ports is called to answer, and shall plead, that by several charters of kings of this realm they ought to be impleaded before their warden, who hath power to punish them for their offences complained of, if they did demerit; and therefore prayeth judgment, whether he shall make other answer in this court. Or sometimes the defendant will plead, that the offence was committed within the principality of Wales, or county palatine of Chester or Lancaster, and in these cases is punishable. These and such-like pleas to the jurisdiction of the court in which judgment was prayed, whether the defendant shall make further answer, are all put in upon oath, and do suspend the cause till the same be over-ruled.

A PLEA to the matter of the charge sometimes admitteth the matter, and yet alledgeth foreign matter of record, that he ought not to answer it; as if a perjury be complained of to have been committed in an answer in the chancery, or in a deposition there, the defendant sheweth the cause wherein the perjury is supposed to have been committed doth yet depend undetermined, and so demands judgment.

SOMETIMES the defendant confesseth the matter, and yet sheweth that he hath been *autrefois convict*, and punished in another court; and demandeth judgment, whether this court will proceed to punish him again.

SOMETIMES the defendant denieth the suggestion, and confronteth the accusation, and maketh good his denial by many trials at law passed for him, and the judgments and sentences of other courts; and demandeth judgment, whether, after such legal trials, he shall be troubled; in all

PART III. which cases the defendant is not examined till the same be over-ruled, neither ought he to be further prosecuted; but if in these latter times, and in these latter cases, and the like, he doth without better answer submit himself to examination, and the cause proceed to examination of witnesses, and come to hearing, this plea to the matter doth supply the place for an answer; as was lately adjudged in *Hoskins' Case* against *Martington*.

DEMURRER is admission of the bill *pro tempore*; and yet for something therein contained matter is alledged, that the defendant ought not to make any answer; and that is either for insufficiency of matter or of form.

INSUFFICIENCY of matter is alledged, sometimes, that the matter in charge tendeth to accuse the defendant of some crime which may be capital; in which case *nemo tenetur prodere seipsum*; or upon a penal law, where he is to forfeit his goods: sometimes, that the matter is proper for ecclesiastical cognizance, as defamation, or such-like: sometimes, that it is petty or trivial, and so not worthy the dignity of the court. These and such-like are causes of demurrer for insufficiency of matter.

DEMURRER for insufficiency of form hath sometimes been for the extraordinary length of the bill above the allotted proportion of fifteen sheets: but it was long since over-ruled, that the defendant ought to be recompensed by costs for unnecessary length, and no cause of demurrer. But demurrer is in all cases where there wanteth certainty, or legal words of charge in the bill; of which I have spoken before. And all these demurrers demand judgment whether the defendant shall make further answer; which are to be put into the court by the defendant in person, and not by his attorney, as the *lord Egerton* held it strictly. But if he rest not upon the demurrer, but plead over denying the matter, then is the demurrer waved, and the defendant proceedeth to examination. If they rest upon the matter in law, then must it be over-ruled; which is
done

done either by referring it to the same judge, or to the king's counsel, or by the judgment of the court upon public motion, or the lord keeper's private opinion. The two former are usual in demurrers to form and matter; and in pleas to the matter of the bill; and to consider if disabilities be legally pleaded. But in pleas or demurrers which sound to the jurisdiction of the court, the two latter are most usual, and most safe for the honour and dignity of the court; and if the same being referred by order, be adjudged against the defendant, or otherwise over-ruled, then is he in ordinary course to pay the plaintiff for his charges and delay forty shillings; and many times much more, if the court conceive the plea or demurrer to be put in only for delay, or to confront the court; as the *lord Houghton*, paid ten pounds to *sir Edward Coke*,

BUT if his plea or demurrer be held good, then is he absolutely dismissed with his costs; yet if there be many charges in a bill, and the defendant demurreth to them all, and the judge certify the demurrer good for all but one only, which he must answer, in that case the defendant shall pay forty shillings costs, for that the certificate is for the plaintiff's advantage: and if the plaintiff procure no reference or motion of the same; or if after the same be referred, the plaintiff let it rest, and doth not prosecute it; by an order taken by the *lord Egerton*, if the certificate be not procured by the plaintiff within two Terms, after the reference, the defendant is to be dismissed with his costs. But that is to be understood always, if it be by the plaintiff's neglect; for many times the judges' leisure will not suffer them to determine some long and intricate cases. But upon the judges' certificate, if the same determine the matter which is referred, that the defendant ought to make a better answer, thereupon doth the clerk of the court make a warrant to the process-maker, to make a *subpœna ad faciendum meliorem responsionem*; which is only in the form of the first *subpœna*, but that the same is in-

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dorsed with these words, *ad faciendum meliorem respon-*
sionem. And if default be of appearance, process of con-
 tempt goeth (as is formerly declared). But if the judges
 determine not the matter of the plea or demurrer, and so
 leave it to the better judgment of the court, then must
 the court be moved upon the certificate, and the defendant
 is thereupon dismissed, or ordered to make better answer;
 and upon that answer, the clerk of the court maketh this
 warrant to the process-maker, to make a *subpœna ad fa-*
ciendum meliorem responsonem; whereupon the defendant
 must answer. For if he should delay with the court se-
 veral times by dilatory pleadings, if the same be certified
 against him a third time, he shall be committed, and not
 delivered till he hath answered; and the costs are doubled
 upon every certificate.

THUS having brought the defendant in to answer, he
 must by his answer either confess the offence wherewith
 he is charged, and submit himself to the mercy of the
 court, which in case he be guilty is his surest and most
 advantageous way; which was used in H. 8.'s time to be
 upon the table in their shirts, by men of great worth (*viz.*
Devereux and divers others submitted themselves in their
 shirts upon the table in the court, and *sir William Butler*,
sir Mathew Brown, and *sir John Leigh* submitted them-
 selves to the king in the court; and were pardoned); or
 else he must absolutely deny it; or he must justify the fact
 by reason of some title, or provocation, and plead over to
 the manner, which is a better course than an absolute de-
 nial; for a mild answer abateth the sharpness of a bitter
 bill, and assuageth the edge of severity, when it is open
 to the court; and in any of these the plaintiff may exa-
 mine upon interrogatories.

JOHN JONES, *register del dioces, et un alderman del citty*
de Gloucester, fuit trahe en cest court (enter autres choses)
pur maintenance. Il plead non culp. et puis per ses testimonies
prove que il ne ad maintayne; mes al oyer ceo fuit reject, et

le maintenance solemment examin. pur ceo que doit aver ceo defend. per ses testimoignes. Ceo fuit sentence HIN. Car. R. I.

AND the answer must be engrossed in parchment, and subscribed by counsel, and so brought to the clerk of the court, who is to give the defendant his oath; which is, that so much of the answer as containeth his own act and deed, he knoweth to be true; and so much as containeth another man's, he supposeth to be true; and he sweareth likewise, that he shall make true answers to such interrogatories as shall be ministered unto him concerning that cause: and thereupon the clerk writeth *Jurat.* and puts his hand thereunto; and this subscription of him is a testimony against all men, that the defendant was sworn, although the same were done alone, and the defendant will deny it; as was notorious in the *lady Ros's* Case, who wickedly denied that she was sworn to cover the falsehood contained in her answer and examination. This being done, the record is delivered over to the plaintiff's attorney to be copied for him, for which he payeth by the sheet, as the defendant did for the bill.

BUT here doth arise another question, Whether all men should be sworn to their answer? And the lords of the parliament say, that they ought not to be sworn, but only should answer upon their honour: and I know that *Henry earl of Lincoln* stood upon this in queen Elizabeth's time; but in vain, for he was over-ruled in it, and did answer upon his oath. But because it is held an encroachment, let us look into former times. In 6. H. 8. I find that the *earl of Northumberland* had a day given him to appear, and to deliberate, *an' vellet discretè respondere causis versus eum exhibitis in hac curia, secundum modum & ordinem curiæ; vel si vellet submittere pietati domini regis in omnibus.* But it is true, that what is *modus et ordo curiæ* doth not appear, and afterwards he did submit himself to the king in all; but I conceive it to be such a privilege which he then stood upon. But in 11. H. 8. the *lord Ogle*, sworn upon a

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book, confessed his fault; and in 15. H. 8. the *bishop of Norwich* *corporale præstitit juramentum*; and in 17. H. 8. the *lord Morley* made oath for a contempt; and in latter times I could shew many of that nature; but these shall suffice to manifest, that the same was not encroached upon the nobility in the *lord Egerton's* time, as some have alleged.

AND so I conclude, that I know not any sort of people (except corporations) freed from putting in an answer in this court by oath; for the body politic is without a soul, to be tried by oath; for attorneys do not make oath there, as in the ecclesiastical courts, *super animam magistri*; and all things are done against corporations in court by their attorney, who by law must be authorized under their common seal; and if any depart without answer, an attachment shall be awarded against him. But if any person shall refuse to answer, being imprisoned, he shall have day given him, and be close imprisoned; and if that will not prevail, he shall, by another day, have the bill taken *pro confesso*; or sometimes he is kept with bread and water, as young *Booth* was.

 §. XI. OF EXAMINATION.

AN answer is not perfect without examination; and it is part of the oath taken, to make true answer to the interrogatories, which in antient times was called *examinatus super responsionem suam*; for to any offence a man in a continued course may make a plausible answer; but where in his own excuses a short question is asked him to which he must answer, the nakedness of his excuse is discovered, as *Adam's* was. And of this kind of examination there are excellent precedents in the time of H. 8. when the examinations were taken by the lord chancellor in the court, where the interrogatories were never above six or seven, and those every

every one a short question. As the *bishop of St. Asaph* in 10. H. 8. being charged for the receiving of the pope's bull for confirmation before the king's license, whereupon he was interrogated, *An fecerit homagium suum regi minus consecrationis receptum? dicit, quòd non.—An habuerit assensum regium assensum suum cum sibi ante minus receptum? dicit, quòd non, nisi solum assensum suum cum sibi conferrent episcopatum.—An pronunciavit juri suo in omnibus per sanctissimum patrem pro provisis, et etiam omnibus quæ sonarent in detrimentum regni seu læsionem coronæ et dignitatis suæ ante minus consecrationis receptum? dicit, quòd non.* Which bishop being put to his choice, whether he would stand to his defence, or submit himself to the king's mercy, submitted himself at bar, and craved pardon. But afterwards this advantage of examination was used like a Spanish Inquisition, to rack men's consciences, nay to perplex them by intricate questions, thereby to make contrarieties, which may easily happen to simple men; and men were examined upon one hundred interrogatories, nay, and examined of the whole course of their lives; but that was grounded especially upon the weakness of the defendant, who is sworn to answer no other interrogatories but such as concern the cause. But to prevent this vexation, the court gave the plaintiff only four days liberty for him to copy, peruse, draw, engross, and put in the articles whereupon the defendant is to be examined; and these were to be drawn and subscribed by counsel, who should be assumed to draw such immaterial questions, or so infinite, especially such a counsel as understands the course of that high court. But clerks, finding commodity would come to themselves, draw the client easily from the charge of attending counsel, but brought a terrible charge upon the client of length of book, and so perplex the court with tedious matters to no purpose, and draw a scandal thereupon of infinite expence; which with little consideration would be eased, if it were restored to antient course, and counsel learned and

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and discreet appointed by the court. But to ease the subject, the lord keeper *Bacon* made an order, that upon no bill the defendant should be examined upon above fifteen articles, and those are not to contain above two questions in any one of them; and if there were any more impertinent, the plaintiff should pay fifteen shillings the article for every one of them which he so administered; which order is in force to this day.

AND the lord chancellor *Egerton* went further: that if any of these fifteen interrogatories did examine the defendant upon his life, whether he were a thief or innocent, or of any crime not charged, nay, to examine a knight whether he had not hedged or ditched in his time, to disgrace him, not only the plaintiff himself, but any one which drew these interrogatories, was committed. Yet it is usual to put thirty, forty, yea fifty interrogatories, and each to contain twenty or thirty questions; and this done by busy clerks or ignorant counsellors.

If the defendant shall depart after his answer put in before he be examined, an attachment is awarded against him for his contempt, upon the examiner's certificate that he doth not attend him; but if upon his entering into examination he find the interrogatories in multitude or impertinent, he may repair to the lord keeper, or the court, and pray that they may be considered of; which is so done; and then, if after reference he depart before examination, a *subpoena* is awarded against him to appear in usual form; but the same is indorsed in *his verbis, ad faciend. responsum interrogat.* But when the defendant cometh to be examined, the same is done privately, and apart, that the defendant can have no advice to answer; neither may he or his counsel have any sight of the interrogatories to give him any directions, but the examiner readeth an interrogatory, and requireth an answer to the same, and then readeth another; by reason whereof if he affirm a falsehood at first he is taken in an error, whereby he is compelled to reform

reform his error; and this examination may be in any part amended by him before he putteth his hand thereto, whereby he doth acknowledge it to be that by which he will abide.

BUT the plaintiff can administer interrogatories but once; for although, after he hath seen the examination, he could clear the cause by asking one question, yet shall he not have that advantage, for *non oportet quenquam errare bis*; and in this warfare his error is deadly to his cause. But the defendant is tied to give a precise and direct answer to the articles, as well concerning the fact charged, as any circumstances which are pertinent to reveal the truth. And for matter of his own act, he must not answer to his remembrance, but directly: but for words spoken whereby collection may be made of the fact, it hath been held, that those may be answered by his remembrance. But if the words be those for which he is charged in the bill, he must answer them certainly. If the defendant will not answer directly to any material question which ought to be answered, then, after the examination finished by the examiner, and the copy delivered to the plaintiff, the plaintiff may move the court to have the same referred to the consideration of any judge, or the king's counsel; who, conferring the answer with the interrogatories, will certify his opinion. If the counsel certify the articles not well answered, then the defendant payeth the plaintiff twenty shillings costs, and upon the certificate the clerk of the court awardeth a *subpœna* against the defendant, *ad faciendum meliorem responsionem* to the interrogatories. If he shall answer insufficiently the second time, upon the certificate, the costs are doubled again, and the defendant committed till he will answer. And I have known some to continue in contempt during their lives. So did *Thomas Ellis ad festam Hill*, for that he would not reveal the names of some persons he set on work to commit an outrage. For in case of interrogato-

PART III. ries it cannot be taken *pro confesse*, for that is but a question, and no position, as a bill is. But if the plaintiff procure a reference, and do not attend the committee, and procure a certificate within two Terms, the defendant shall be dismissed with costs, unless he can shew good cause to the lord keeper, or clerk of the court,

§. XII. OF PARDONS.

HAVING entreated of pleas, demurrers, answers, and examinations, I have omitted to treat of one kind of pleading very frequent in latter times, which is, the pleading of the king's pardon; which because it yieldeth many questions, and, as I conceive, is not tied in all cases to the certain time of putting it in by way of answer, I have therefore thought good to handle it by itself.

PARDONS are of two sorts: special or general. Special pardon for a particular offence which is complained of in this court, when the king doth pardon any suit here depending, as *sir Edward Coke* hath declared, although the same be granted when the cause is ready to be heard; for such a one *sir Pexal Brocas* obtained 10. Jac.: and this may be pleaded at any time, so it were granted *puis le darrein continuance*. But if the king grant a pardon for an offence before it be complained of; and the party being called to answer will not plead it, meaning to use it at the hearing of the cause, he hath lost the benefit of the pardon; as the *lord Popham* held it in *Fenner and Warren's Case*; but his duty is, at the next time he is called into the court he must plead it, and shew it forth under the seal, and crave that it may be allowed. Sometimes the defendant disavoweth the benefit of the pardon. So did *sir Robert Sheffield* in 10. H. 8. submit himself to the king's mercy upon his knees, upon the table, before the lords;

lords; and so did one *Cooke* about the same time; but that was, for that his writ of allowance for the pardon was surreptitiously obtained. But it hath been questioned, Whether the pleading of a pardon be not a confession of the offence? or if a person plead a pardon, Whether he may be received to deny the offence? or, Whether the pardon shall be allowed, unless the defendant humbly acknowledge the offence? And in *Werglin's* and *Manning's* Case, where the defendants plead a pardon, and would afterwards have relinquished it; for that the court refused to give them leave, unless they would relinquish it for all; and thereupon the court proceeded not; but the lord chancellor *Egerton* made that the reason of his decree against the defendants in chancery whereupon he overthrew old *Werglin's* will, made with the greatest perfection that ever I knew any: which error, I hope, God hath pardoned; for surely a man may plead his pardon to save his expence, although he be innocent of the crime; as that learned gentleman *sir John Walters* said in that Case, he would never neglect God's pardon and the king's. And it is to be seen in 7. H. 8. *sir John Denham* pleading the king's pardon, he pleaded and craved the allowance with protestation of his innocency; and although great deliberation was had with the judges and king's counsel about the pleading, yet the pardon was in open court allowed him. And although a pardon be pleaded, yet shall not that wholly determine the cause, as pleas and demurrers shall do: for after that plea the court may proceed for the plaintiff's relief, although the king's fine be gone; as it was adjudged betwixt *Read* and *Lygon* in 1. E. 6. and in 34. Eliz. betwixt *Brewerton* and *Starkey*. Yea, and at all times upon special pardons pleaded which are obtained after the suit depending, he which pleadeth the pardon must pay the costs of the plaintiff expended before the pardon pleaded: but it is to be otherwise when the defendant pleadeth a general pardon; for the plaintiff is the rather to blame to question him, knowing that the offence

PART III. offence is pardoned. Yet that grows also questionable, for that the same general pardon is not of force, unless the same be pleaded; and he cannot tell whether the defendant will plead the same or not; but surely the same hath been a great question, whether the courts of justice shall take notice of the general pardon without pleading, as the judges do upon trial of life, these causes being criminal, and trenching almost as far as life; and the court for many years did give allowance upon the parties demand at the hearing, without pleading.

BUT it seemeth, upon the consideration of the many exceptions both of persons and offences contained in general pardons, and *sir John Denham's Case*, and other precedents, the same by opinion of the judges hath been denied, and so strictly been observed, that unless the defendant plead the general pardon by way of answer, it cannot be allowed him. For it was denied to those of the Dutch nation who were denizens, to be pleaded by way of rejoinder; for seeing they might have pleaded it by way of answer, they surcease their time.

BUT in some cases the general pardon shall be allowed to the defendant at the hearing, without pleading by way of answer; for whereas all offences which have depended above eight years in the Star Chamber are pardoned wholly, and those that have depended above four years the corporal punishment is pardoned, in those cases the pardon cannot be pleaded by way of answer: and if it should not be allowed by way of demand, it were in vain to have it inserted.

AND that this hath been so allowed at the hearing, may be seen in the Case of *Golding* against *Sharp*, *M. 8. Jac.* as in divers other Cases. Yet let me observe this, that the general pardon may be pleaded after a demurrer put in, or any insufficient answer; as it was adjudged in *Stephens*, and *Dodd's Case*, and in the Case of *Brooke* and *Oldfield*. The court may refer the consideration of a plea of a pardon

don to be considered of; and if it be not legally pleaded, he shall be ordered to make a better answer, and then he may plead it better. Yet there be some Cases wherein the court usually taketh notice of the pardon, without pleading; and when persons have committed contempts in non-appearance, and process of attachment is prayed against them, upon allegation of the pardon by the attorney, the process of contempt is stayed; and yet it seemeth, that in strictness of law the process ought to proceed. And I well remember, that the *lord Egerton* was of that opinion in the Case of *Henry earl of Lincoln*, and asked me *who* had authority to allow of the pardons but the court, and not the clerks: yet the *lord Egerton* was of opinion, that where the contempt was pardoned, the plaintiff should have no costs for his process of contempt. But all cannot plead this general pardon; for an alien born, not denizen, who is only a subject *ratione loci*, is no subject intended within the benefit of the parliament to be pardoned; and so it was adjudged in the *Dutch Case*; and yet they pay subsidy (as was then alledged), which moveth the pardon.

And note, that upon the plea of the pardon, which must be put in by the party himself, the party is discharged without examination upon interrogatories, although the court should be pleased to proceed for the plaintiff's damages, or other relief; for the plaintiff shall in that case make his proofs, and not help himself from the defendant's examination, that being only a prerogative annexed to the crown, and not civilly allowed betwixt party and party, unless in case the plaintiff will be concluded by the defendant's own examination. And it hath been much questioned, whether in case of forgery upon the stat. 15. *Eliz. Dyer*; and there held, that he pardoned the corporal punishment; but that was after sentence, and the party may release the costs and damages, and yet they are parcel of the sentence. But of this I have spoken in the Second Part in treating of forgery.

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§. XIII. OATH OF SERVING PROCESS, AND OF OATH
FOR EXCUSE OF APPEARANCE.

HAVING passed through the process of the court to bring men in to answer, I touched the ground of process in contempt; which is an oath to charge the party with the contempt. For it is great reason, that as the defendant shall be punished by commitment to the Fleet, if he do not appear, being sufficiently admonished to appear; so likewise, if the plaintiff will either by himself or any other make a false oath that he was warned sufficiently, when in truth he was not sufficiently warned, or perhaps not at all, then the plaintiff for such vexation shall be subject to punishment. For which purpose, before any process of contempt is awarded, the oath of him which testifieth the service of the process is entered upon record, and sworn unto; which affidavit was antiently made before the lord chancellor or lord keeper: but in the time of *cardinal Wolsey* in the 18th year of *H. 8.* there was an order entered, that upon affidavit made, process should go forth in ordinary course, so that the oath was made before a master of the chancery; but of late times, the same hath been denied to be read in the court; as it was in *sir Stephen Proctor's Case*; and since that time the clerk of the court hath authority to give the oath, and to keep the same upon record; that if the defendant be unduly vexed, he may take his remedy thereupon.

BUT it is to be observed, that although the oath be false, the other party cannot confront that oath with another, so that the second oath doth stand with the former, that both may be true; but if the first oath be false, the party grieved may take his remedy by bill, but he ought to be committed.

THERE was in antient times no oath made for the service of any process, except only for appearance and injunction,

junction, by reason that the parties did always personally attend the court; and since that time that they had liberty to appear by attorney, the defendant is called to rejoin, or join in commission to examine witnesses by process, and to hear judgment by process, and to pay costs by process; all which he was ordered formerly to do, and was to perform it at his peril. I shall therefore shortly set down what oaths have been held sufficient in all these cases to compel the person to appear, and what oaths have been held sufficient to excuse the persons which are served to appear.

AND an oath of shewing the writ to the plaintiff-party, and delivering a ticket, or leaving the same at his house of abode, so that he were there, or he which served it was told by any child or servant of his that he was there, before the return, hath ever been sufficient.

BUT if a messenger were sent from the court, or if the sub-almoner, who is known to the court, make the oath, then his oath of information given to him that the party acknowledged that he was served, hath been held ground for an attachment. But in case of appearance, every defendant must have particular notice of the suit, although at the first the party principal only were called, and he was enjoined to bring in his servants. But then many times oaths were made that he did his endeavour, and his servants wilfully departed from him; which, if he were bound in recognizance to produce them (as was most usual), did not dispense with the same. And more than that, it appears in *H. 8.*'s time, that one being bound to appear by recognizance, made himself to be arrested as he came, and imprisoned in the Compter, by reason whereof he could not appear at his day; and upon oath hereof he could not be discharged, but the time was referred to the king's counsel. But this is not to my purpose for appearing upon process; in which case delivery of the process to the wife

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was held a good service, and oath made of the parties, or any stander-by that saw the service.

Now for excuses for appearances, I find there be many that dispense with this writ; as if the age of the defendant be above seventy years. So likewise impotency and sickness; and such an oath was allowed for one *Henry Hudson* in 12. H. 7. being vicar of *St. Dunstan's* in the West, within one mile of Westminster: and the oath is held sufficient in all these cases, although the party extend it no farther than as he believeth in his conscience. So likewise employment in the king's service is a good cause, as appears by a letter written from the *earl of Surrey* to the lord chancellor; and about 10. H. 8. the vice-chancellor of Cambridge had such an excuse allowed unto him for being employed at the king's command. So likewise if the defendant shall make his oath, that he came not to his house till after the return of the process, or had not notice till the return, his contempt shall be excused. But in these cases he shall pay the fees of the attachment, because it was awarded upon sufficient grounds till the excuse came. But if the attachment be awarded upon an insufficient oath, it is doubtful whether the defendant shall pay the costs of the process: yet it seemeth that he shall, because the awarding of the process is the act of the court, and not of the party.

FOR affidavits for the service of a *subpœna* to rejoin, or join in commission, and to hear judgment, and how they shall be certified, I will declare in their proper places. But it is to be observed, that in all cases where an affidavit is to be taken, it must never be retained to the merit of the cause, but in point of prosecution or contempt of the court; where also this privilege an affidavit hath, that whereas in other courts upon affidavit made of a contempt the offender shall be examined, unless his accusers will prove the contempt against him; yet upon affidavit in this court,

court, the party charged shall be committed without his confession. The clerk's fee for entering the affidavit is two shillings and four-pence, and for the copy thereof (if it be required) two shillings.

§. XIV. WHO MAY BE ADMITTED TO ATTORNEY.

AFTER answer and examination, in antient times, the defendant did then find sureties to appear when he should be commanded, and these were called *fidejussores* in the old records; and then, upon suit made to the lord chancellor, they were dismissed to attend, which advantage to an attorney is a discharge to a personal attendance. But they were first bound to stand to the act of their attorney. So I find that one *White*, 10. H. 7. was bound in one hundred pounds, that the city of York should ratify what *Stoodham* the attorney did, in the cause which *sir James Danby* had against the city; but afterwards their agreement was only taken, and the admittance was by the lord chancellor entered in this form:

A. B. licentiatuſ recedere per dominum cancellarium comparare per attornatum A. S. et debet fidem de rato habituro, &c.

ABOUT 10. H. 8. the entry was, *A. B. admiſſuſ eſt per dominum cancellarium ad attornat. et conſtituit J. H. attornatum ſuum.*

BUT afterwards it grew uſual that it was ordered, that the defendant, upon his answer and examination, if he confeſſed nothing, ſhould be admitted to attorney.

AND in 16. H. 8. a general order was made, that if any were called up, and confeſſed not the matter, but traversed it, they ſhould be admitted to attorney; which order hath ever been ſince continued; but that is now enlarged, for that as well thoſe which confeſs the offence as thoſe which deny it, are now of late admitted. But in the lord

PART III. *keeper Bacon's* time there was an order, that those which confessed any offence, the examiner was to certify that to the court; and upon his certificate, the court took order for the party's forthcoming. But of latter times, there is no such credit or countenance given to the examiner's certificate; especially since they have been under-clerks; and the entry is now, *A. B. ponit loco suo W. J. tam ad perendum quàm ad lucrandum*; for which the defendant payeth to the clerk of the court.^c

AND he is thus admitted, either when he is examined, or if he attend four days, and no interrogatories put to examine him, then upon certificate from the examiners that there are no articles put in, he is admitted to attorney; and that is a license for him to depart without any examination at all; yet may the court, upon motion afterwards, call him again to be examined. And of latter times the clerk of the court will send him word to come to be examined before his departure out of the town, the interrogatories coming in forthwith upon his admission. But it seemeth that it is beyond his authority, for he is concluded by the act of the court once entered; and no man can alter it but the lord keeper or the court. And it must be understood, that as in the case of answer, so in the case of examining, the king's attorney is not tied to four days to put in interrogatories, but sometimes the defendant attendeth ten days, or twenty days, and cannot be admitted but by consent of the court. For the king's attorney may refuse to put in his interrogatories to either of the examiners, and require some personages of honour or eminency to be appointed to take the examinations, as it was in the *Dutch Case*. But it may happen in some case that the plaintiff shall have longer time than four days to put in his interrogatories to the defendant. For if the complainant serve four persons to answer upon one return, if one answer, and the rest answer not till three days after, the plaintiff hath four days after the three have answered,

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•to put in interrogatories to the fourth; but if he take out attachment against three, then must he put in interrogatories against the fourth upon the fourth day after the answer; and so it was ruled in *sir Philip Tyrwhitt's Case*, *M. 4. Jac.* and the reason is, for that the plaintiff hath chosen whom he will examine first. Again, if the defendant will put in his answer the first day of a return, when he never had appeared till *quarto die post* (for the plaintiff hath no reason to attend him), then he is compelled to attend the court. In like manner if any standing in contempt will secretly come in, and put in his answer before the return of the process, he shall not be admitted to attorney in the four days, unless the plaintiff take notice of his appearance by accepting the fees of the attachment, and then he ought to put in his interrogatories. But if the defendant shall come to put in his answer in vacation-time, he shall not be admitted to attorney, unless his process be made returnable in the vacation; then the plaintiff is tied to attendance, as well as the defendant.

§. XV. OF THE PLAINTIFF'S AND DEFENDANT'S JOINING IN COMMISSION.

I HAVE touched before that answers are to be put in, either in the court, or in the country, by commission; and that the commission is directed to four commissioners, who have power given them to swear the defendants to their answers, and to take their examinations. They were in ancient times upon great advice selected by the court, the principal men of nobility, or great bishops, abbots, or priors, living near the place; but of latter time, when the defendant maketh oath for his excuse, or obtaineth favour from the lord keeper (whose great favour it is to give leave to answer the *dedimus potestatem*), or when the attorney consents.

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consents to have a commission granted (which of late is very usual by reason of their profit, which the lord keeper yieldeth unto them as an advancement of the benefit of their places, but yet it was more beneficial when they had it by the mere favour of the lord chancellor or lord keeper, who gave them continual access unto them for that purpose; as the *lord Puckering* did, under whose hand I have seen, at the suit of an attorney, *dedimus potestatem* in favour granted in a day, upon short petitions exhibited unto him, subscribed only *fiat*), the order being obtained if it be of grace, or a rule entered if it be upon the validity of the affidavit of excuse, by the clerk of the court, the defendant giveth the plaintiff day to join in commission with him, and delivereth to his attorney six gentlemen of quality, all men without exception for indifferency, out of which the plaintiff chuseth any two to be commissioners; and then the plaintiff delivereth to his attorney six of equal condition, out of which the defendant chuseth two also: all these are mutually entered into either of the attornies books kept for the purpose, and the place of execution, and the time, which is mutually agreed upon (which is for the most part in equal distance), especially favouring the plaintiff and his commissioners ease; unless the plaintiff be decrepit, and then they may have a clause in the commission, that the commissioners shall go home to their houses *si commode laborare non queant*; and either of the parties may require a day certain to be expressed in the commission for the execution thereof, if they please; otherwise it goeth upon fourteen days warning to be given by the one side to the other; which warning is sometimes expressed in the commission to be left at a certain place, and the commission is awarded to four, three, or two, so that less than two cannot execute it.

If the plaintiff will not join with the defendant in the commission, he hath day given him to join; and if he do not, a second day is given him, that the defendant shall have

it alone ; and if by that time the plaintiff deliver not his commissioners names, and agree to the commission, the same is awarded to four justices of peace next adjoining to the defendant's place of habitation, who are presumed to be persons of integrity and indifferency. But the court or the lord keeper may, if he please, appoint all the commissioners himself ; there being no means to abridge his antient power.

THE commissioners being agreed upon, the defendant's attorney maketh transcript of the bill, and engrosseth the same *de novo* in parchment. And then the clerk of the court maketh a warrant for the commission to the process-maker, who receiveth the same with transcript of the bill, and maketh the commission, and includeth the bill therein, and carrieth it to the seal, the bill and writ being included within the broad seal, which must be delivered to the commissioners sealed ; the tenor whereof is in these words : *Jacobus, Dei gratiâ, &c. dilecto nobis A. B. C. et D. salutem : Sciatis quod dedimus vobis præ tribus vel duobus vestrum plenam potestatem et auctoritatem accipiendum responsonem J. C. et R. T. ad petitionem W. B. quam verbis mittimus hiis præsentibus interclusam, necnon examinandum prædictum J. C. et alios præfatos defendentes de et super quibusdam interr. ex parte W. B. coram vobis ministrandum ; et ideo vobis mandamus apud H. 18. die Maii instantis congregatis, et sic de die in diem donec compleveritis ; proviso semper quod si J. L. et al. personaliter accedatis eisdem defuetum de et super materiâ responsonis prædictæ. ac circumstantiis ejusdem tactis per eos prius coram vobis sacrosantis Dei evangeliiis juramentum corporale ministratis ; ac ipsius defendentes et super interr. prædicta sacramenta sua diligenter examinatis examinationesque suas recipiatis, et inscriptas in pargumeno redigatis ; et cum eos sic ceperitis, nos inde et consilium nostrum apud Westmonasterium de toto facto vero in hac parte nechon de nomine attornatum ipsorum*

PART III. *defendentes ad lucrandum vel perdendum in præmissis in Oet. Sanct. Trin. proxim. futur. sub sigillis omn. distinctè et apertè certificetis, absque copiis partibus inde reddendè, remittendis nobis petitionem et interr. prædicta unà cum hoc breve. Teste meipso, &c.*

WHICH kind of petition is many times awarded to one of the examiners of the court, who executeth it alone. But because the commissioners are named, two of the one party and two of the other, some question hath been, Whether if, by default of the writing of a clerk, one commissioner's name be mistaken, by reason whereof he hath no authority to execute the same, and the other of that name cannot or will not come to the place, whether then the examination taken by the commissioners names by the one part shall be received and allowed? And it hath been justly by the Lord chancellor Ellesmere held, that any two of the commissioners should execute the same, and shall be held indifferent howsoever named by one party; for they are the king's commissioners, and not the parties. And the difference was taken between commissioners and arbitrators: the latter having authority from the parties are not intended indifferent, unless they be of both parts to make the award; but the commissioners being commanded by the king ought (and is intended that they will) to perform their duties; and therefore no exception can justly be taken unto them, if there do no practice appear to the court.

THE answer being engrossed in parchment is brought to the commissioners; which may be received without the hand of any counsel, for that it is presumed in remote parts men are *inops consilii*; which the commissioners ought to read before they minister the oath; for if it be a demurrer, or a plea in bar, it is said, that they have no authority by the commission to receive it, unless there be an express order of the court that they shall take it. As a proof thereof, there be many orders to authorize them

to that purpose. But if it be an answer with the oath taken, and which is ministered in the same manner as is before rehearsed, they except.

AND although it be said in the commission *absq. copiis partibus inde reddendis*, yet the commission being to examine the defendants upon interrogatories to be ministered by the plaintiff upon his answer, the commissioners must suffer the plaintiff and his counsel to take a view of his answer in their presence, and to take consideration thereupon to minister interrogatories in due time to examine the defendants; but if the plaintiff or his counsel shall not require the same, nor minister any interrogatories, then are the defendants to be discharged of examination; but the writing and engrossing of these examinations is to be wholly at the defendant's charge, it being for their ease; but the commissioners' charge is to be equally borne, if chosen, by both parties: but if the plaintiff shall attend the time, and the defendant shall not appear, and bring the commissioners (for they have always the carriage thereof, it being awarded in their favour), then, upon a certificate of the plaintiff's commissioners of their attendance, the plaintiff hath his costs taxed by the clerk of the court according to the quality and conditions of the parties; and upon return of the commission, if by that time the defendants put not in their answers in person, an attachment is awarded against them for not returning their answers by the commission. But if one defendant shall sue forth a commission for divers, which were never served with process, and without their pivity, upon the return thereof, an attachment shall be awarded of course; but upon the oath of excuse, all those which had no notice shall be discharged of contempt; but the plaintiff shall be satisfied his costs, for that he had a good ground for the prosecuting the contempt, and the defendant must move the court against their fellow-defendants. But it is a general rule, that no man, without special favour, can in ordinary course have.

PART III. have a commission which is under contempt; no, not if he have answered insufficiently, and the same was overruled, it being a kind of contempt, he is to satisfy the court in person.

THE examinations being taken and engrossed in parchment, they are to be returned up by the commissioners, or some from them, under their seals, upon oath that the same is not altered. And if the defendant be examined upon the view of any writing or deed, the same is to be returned included, and safely to be kept by the clerk of the court. For if the plaintiff which examineth any one upon any such writing, which is called an *exhibit*, if the same shall be taken away by him, and does not remain as upon record, either with the examiner if the party be examined in court, or delivered to the commissioners and by them returned into the court, no use can be after made of that upon hearing; as it was adjudged by his majesty and the judges in the *countess of Exeter's Case*; and the reason was, for that the thing exhibited is by the examination incorporated into the defendant's answer, and made parcel thereof; which if his adversary should keep in his custody, he might pervert and alter at his pleasure, which were unjust. But if the commissioners shall not certify the examinations, or if the same shall be lost in carriage, a *certiorari* shall be directed unto them, to certify the same out of their first papers, as it was held in *Large's Case*.

IF the plaintiff or defendant shall cause one another to be arrested, going, coming, or at the execution of his commission, he which causeth the same shall be committed. Or if they shall unreverently behave themselves before the commissioners, or to the commissioners, if any stranger shall behave himself unreverently to the commissioners, or any of the commissioners in the cause, an attachment shall be awarded against them, and they examined thereof; and if they confess the same, or if the same be proved against them,

them, they shall be committed. And if any of the commissioners or parties shall be arrested attending this commission, they shall have a writ of privilege to discharge the action,

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§. XVI. OF INSERTING NAMES INTO THE BILL.

IT was a great grievance, that men exhibited their complaints, and, under pretence that the plaintiff could not be drawn to answer, sued out process, and continued the same at their pleasure, and so delayed the defendants, after they had driven them to a chargeable attendance for examination upon interrogatories; and sometimes colourably inserted names of other defendants, at their pleasure: all which delays were not to be helped without motion in open court, which could not easily be obtained. Whereupon the court in Easter Term 38. *Eliz.* did order, that every plaintiff should do his best endeavour to serve all the defendants named in the bill, so as they might appear the next Term following after the exhibiting of the bill, at the farthest; and that no plaintiff having served one of the defendants named in the bill with process, should have any *subpœna* upon the same bill against any other of the defendants to answer, after one term passed after the exhibiting of his bill, unless the plaintiff took out new process against such defendants upon the exhibiting of his bill, and made affidavit that he did his best endeavour to cause the same to be served, and could not serve the same; and if he did otherwise, the defendants which were served, and had answered, might seek their dismissal, as if new process had been sued out.

AND it was further ordered, that every process should be sued out in ten days after the filing of the bill; and not any time after upon that bill, in case process were not sued

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sued out before the bill filed, which was then held unlawful. And it was also ordered, that no plaintiff in this court should, after process sued out upon his bill, add any more names of defendants to the same without the special warrant of the lord keeper.

BUT the court finding this order something too sharp for the prosecutor, who was ever intended to be favoured, and that by reason thereof the court decayed much within four years, the *lord keeper Egerton* calling the judges unto him reformed those orders; and did then order, that the plaintiff should have liberty by the space of a whole term next after the bill exhibited, to sue for any process upon the same bill, or to insert any name of defendant thereunto, and should likewise be permitted to renew any process by the space of two whole terms next after the bill exhibited, and that without any affidavit, any former order to the contrary notwithstanding; which latter order hath received a continued allowance, and been held very behoveful to the subjects, and honourable to the court, for the space of twenty-two years. And if any person be straitened, for that by some latter discovery other defendants names came to light after the time limited, or in the like case, he may repair to the lord keeper, who hath power to order any particular case, notwithstanding the general rules, upon good matter shewed unto him. And these rules extended not to the king's attorney, but he hath the antient liberty without any restraint, and the party grieved can only fly to the court by motion, if by his indifferent power he be pressed further than is convenient. And it is worthy of observation that, in antient times, it was usual, that upon the hearing of a cause, many other offenders were discovered, and they always ordered to be called upon and punished by a second day of hearing; and since the course of inserting names and continuances of process, it is rarely seen but all the defendants are discovered upon examination of the first, and so-called in, and orderly proceeded

ceeded in together at one time; so that in thirty years no cause was a distinct cause to every defendant, and no joint offence, as is usual in that court of riots and other offences: neither is it necessary for the plaintiff in his bill to desire that he may insert their names when they be discovered, although it be very useful, for he may do it although it be not inserted by the bill, as it was adjudged in —'s Case.

§. XVII. OF REPLICATION.

AFTER all the defendants are examined upon interrogatories, and have answered, in the next place the plaintiff is to reply; which replication put in, the plaintiff must content himself with the answer and examination, for he cannot then go back, for that he hath admitted it as sufficient, although it be very imperfect. But in some cases there needeth no replication. The one is, when the defendant by answer or examination confesseth the offence, so thereupon the plaintiff may go to hearing upon his own confession; but of that I shall speak when I come to treat of hearing: the other is, when the defendant pleadeth, generally, not guilty, whereby an issue is joined, so that there needeth no replication. But process may be sued out *ad rejuvendum in commissione*, and thereupon witnesses be examined, and proceeded to hearing; but in such case the plaintiff doth reply. The same is a prosecution which shall keep his cause from dismissal, as it hath been held.

IN antient times, the plaintiff replied the same Term he preferred his bill, and the defendant rejoined then also; but afterwards the plaintiff falling to dally with the court, in *Hil. 2. Eliz.* the lord keeper Bacon made an order, that in all those cases wherein an answer was put in Michaelmas Term before, if the plaintiff did not reply by the first

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first day of Easter Term then following, the cause should be dismissed; whereupon in Easter Term 38. *Eliz.* that course was settled as an order, that if the plaintiff should suffer the whole next term after answer to pass without replication, and should not reply on the first day of the term then next ensuing, then the cause to be dismissed with costs.

BUT that order by the *lord Egerton's* late orders of reformation in 42. *Eliz.* was continued only as it was supplied, that upon not guilty pleaded whereas no replication was needful, the plaintiff should reply within seven days of the beginning of the second term after answer put in; but the defendant upon these orders catching an advantage of dismissal, the *lord Egerton* did for indifferency at all hands order, that in the second Term the defendant should give the plaintiff a week to reply, or otherwise to prosecute, or in default thereof to be dismissed; which order standeth in use to this day, and is of great justice and indifferency.

BUT I have shewed, that in some former times the plaintiff did not seek the defendant by process, but he gave his continual attendance, and he was bound by the warning given to his attorney; but that was many times when the defendant's own servant was his attorney; but since they were settled officers which always attend the court, warning was given in all cases to the party by process, where his attendance was necessary, as in this case, to join the issue in the cause, whereupon witnesses are to be examined for this offence: but by reason that it was but a notice that is required, therefore the serving of any one defendant is a warning to them all; and therefore, if one be served, and he take notice thereof, and join the issue, and in commission, and the plaintiff examineth his witnesses, and the same are published, the cause shall as well proceed to hearing, as if all had been served; except it shall appear that there was collusion betwixt that one defendant.

defendant and the Plaintiff, as in the Case of *Wombwell* against *Wombwell*, 30. *Eliz.*; or else, that the defendants stand charged with several and distinct offences, as it was in the *Dutch Case*; in which cases the defendant shall have a new serving to rejoin.

THE replication itself is but the avoidance or denial of the answer and maintenance of the bill, to draw the matter to direct issue, which may be proved or disproved by testimony; but if any thing be omitted out of the bill material to charge the defendant, although it be alledged by way of replication, it is not pertinent, nor shall any defendant be convicted thereupon; by reason whereof there is so little regard of the replication, as that they are only drawn by clerks, without any regard whether there be any issue joined in the case or not, no counsel being made privy or acquainted therewith; insomuch as if many causes were well looked into when they come to hearing, the parties would be found not to have joined any issue; which happeneth by reason that the replications be received without any counsel's hand or perusal, but the same being engrossed is brought under the plaintiff's attorney's hands; which is done for this reason, for that he thereby chargeth himself to answer the clerk of the court for the copies of all the defendant's answers, for that the plaintiff cannot by course of the court reply until he hath taken the copies, and paid for them; and the replication being filed, the clerk of the court maketh a warrant to the process-shaker to make a *subpæna* for the defendant to rejoin, for which warrant he receiveth only two shillings, and then the writ is sealed, containing no other form than the usual *subpæna* to appear, but the same is indorsed *ad rejun-
gendum replicationi* *f. S.* at the return whereof the defendant appears, and takes a copy of the replication, and puts in a rejoinder. And the pleadings have, in antient times, proceeded to the surrejoinder and rebutter; but, as I have said, of latter times those are wholly out of use, by reason that
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PART III. the clerks only direct all these pleadings, without the advice or subscription of any counsel. The defendants do then join in commission, and proceed to the examination of witnesses.

§. XVIII. OF TAKING RECOGNIZANCE.

BUT before I proceed to entreat thereof, there are usual things which do not hasten the hearing of the cause, but are, as it were, in the bye in most cases, and do not tend to conclude the cause, but either to prevent mischief, or prepare the cause towards the hearing. And I find that the same consisteth in three several points—taking of a *recognizance*, the awarding of the *subpœna duces tecum*, and *injunctions*; all which I handle in this place, for that for the most part they are awarded after the time of the examination.

And first for *recognizance*. I observed before, that in ancient times the defendants, upon their answer, did always bring *manu captiores*, or *fidejussores*, which gave recognizance to the court, that they should appear *de die in diem*, and sometimes abide the order of the court; that they should appear at the hearing, and always to commit no outrage. But of latter times the same is not of use; but now recognizances which are taken are either to appear at the hearing, which is very useful, or to keep the peace, or sometimes to be of good behaviour. As for recognizances to appear at the hearing, or any such like, by latter orders of reformation the clerk of the court may take the fees but for one recognizance, although there be many defendants; but the same is usually entered into upon any confession of the matter by any of the defendants; and at the hearing of the cause the party is called upon his recognizance, and if he make default, the same is recorded, and the recognizance is estreated in the exchequer for the king's benefit.

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IN the time of *H. 7.* and *H. 8.* when great persons were called by process, or when suits were betwixt the abbot and convent, or corporations, they were first bound on both parts to keep the peace, and to commit no outrage; sometimes men were bound to wear no weapons; and in all these cases recognizances were taken of them in great sums of money, and always before the lord chancellor or the court; yea sometimes the court hath awarded special *supplicavit*; and after that time, if there were suspicion of outrage betwixt the parties, in *6. Eliz.* both plaintiff and defendant, *viz. Cardinal and Christmas*, were bound to the good behaviour; but more commonly of latter times recognizances for the peace. *Sir John Stafford ad sectam Townshend, 4. Jac.* was bound to the peace, upon oath that he used to break the peace, and that the plaintiff was hurt by an unknown person; and the condition of his recognizance stretched for his servants and followers as well as himself. But of late times justices of peace are trusted with such recognizances, and the court leaveth it to them; but surely the recognizances to this court breed a more awful respect than those taken by inferior men in the country; so that of late there are not any recognizances but for appearance of defendants at the day of hearing of the cause, and from the plaintiff, if he prove not his complaint against the defendant; the latter of which was never used in former times, and not to be used often but upon just ground and certain information.

§. XIX. OF SUBPOENA DUCENS TECUM.

It is likewise very usual, that the court awardeth process of *subpœna ducens tecum* against any defendant, or any other, to bring into the court any writings, deeds, or evidences, which may conduce to manifest the truth of the

PART III. matter in question. So I find that in *H.* 8.'s time, process *ducens itum* was awarded to the mayor and commonalty of York to bring in charters; and in the same king's time the inhabitants of Denbighshire, Merionethshire, and Carnarvonshire were ordered to bring in all charters granted to them by *H.* 7. which they trusted in the hands of an honourable person of the presence to keep for them indifferently; but the deeds and evidences were usually ordered to be brought in almost in every case. But of latter times the court granted no *ducens tecum* in ordinary course, unless the writing be charged in the bill to be false, forged, and fraudulent, and confessed by the defendant to be in his custody: and in such case, if it be both charged in the bill to be false, forged, and fraudulent, and confessed in the answer or examination, the clerk of the court awardeth *ducens tecum* of course. ^e

BUT if there do appear to the court that there is any writing in the defendant's custody, or that of any other's, which will manifest the truth, the court upon motion, or the lord keeper, may award a *subpœna ducens tecum* to bring the same in. So in the reign of queen *Elizabeth* certain persons were questioned for engrossing of corn; and being interrogated to whom they sold the same, one of them answered, he could not tell without view of his books which he kept for his trading; whereupon the lord *Egerton* awarded a *subpœna ducens tecum* to compel him to bring his books into the court, of which the other party had view to discover the truth. So in *sir ——— Manning's Case*, who was charged with corruption in the place of chancellor to the lord bishop of *Exeter*, and giving sentence corruptly, and without good ground, for bribes, in his examination he referred himself in all this to the acts of his court remaining with his register; whereupon the lord chancellor, being moved, awarded a *ducens tecum* to one *Michaëlls*, the bishop's register, to bring into the court all the acts of the said chancellor's court, to inform this

this court of the truth at the hearing of the cause. And of late time one *French* was, and so is questioned for notable deceits in divers counties, in collecting of great sums of money in the county under colour of gathering his majesty's rents of his honour of *Tickhill*, parcel of the *Dutchy of Lancaster*; whereas the inhabitants of the places where he made his collection, owed neither suit nor service nor rent belonging to his majesty or that honour; nay, some of them held no land at all of the king, nor of any other person. And for the discovery thereof being examined, whether he had not levied several sums of money of divers persons named in the interrogatories, and what those sums were, he made answer, that he could not set down the same without view of his book and writings in the country; and being ordered to answer better, gave the same answer again; which giveth just occasion to force him to bring in his book upon the *subpœna* served, which is the same in effect with the other *subpœna*, but that the clause of *ducens tecum* is contained in it.

If the party appear not upon affidavit made of the serving of it, an attachment is awarded against him; and upon his apprehension he is committed until he will bring the same into the court. But if he cannot make oath that the same was not in his custody at the time when he was served with the process, but delivered to another person, he may be excused; and the person whom he voucheth shall then be called by process to bring in the same into the court, unless it shall appear that the same is thrust from hand to hand cautelously to defeat or abuse the court; and in such case the court doth often attach them all, and order them to be examined upon interrogatories to discover the truth; and if it be found that they have cautelously agreed to abuse the court, the court punisheth them all, as well parties as strangers: but otherwise bonds and deeds questioned to be forged are usually brought into the court, and remain till the hearing; the view of the deed

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deed many times giving great light to discover the forgery; as in *Whitaker's Case*, where the lord *Popham* discovered the forgery by view of the lord *Monteagle's* seal (being an horse), from whom the lease in question was pretended to be made.

§. XX. OF INJUNCTIONS.

THERE followeth in the next place the writ of Injunction, which is granted as a protection to defend the plaintiff from the desperate malice of the defendant's device which he compasseth against him by fraud and falsehood. As if the bill be preferred against the defendant for forging an obligation, and after he is questioned, to gain some countenance to his false deed, he will attempt some suit in the common law upon it, the court will in this case grant an injunction to stay the suit: and in antient time the court began every case with an injunction, to settle the possession in peace until the cause were determined; of which there are not so few as one thousand precedents. But when the court perceived that men did thrust suits into this court after they had unlawfully got into possession, thereby to strengthen a bad title by some feigned suggestion, the court hath forborne to meddle with the settling of possessions, except in case where the defendant, upon examination, confesseth that he hath got the possession from the plaintiff by fraud, force, or outrage, or by pretext of some forged deed, or by perjury; in all which cases the court hath used, upon confession, to settle possession. So likewise it hath been usual, that if complaint be made upon the stat. 4. & 5. *Philip & Mary* for procuring of unlawful contracts of women under sixteen, to stay the proof of any contract in the ecclesiastical court till the
cause

cause be heard, if any undue practice be confessed. And I find that long before that statute, viz. 11. H. 7. in a Case between *Cromer* and *Hudson*, *Cromer* was enjoined to bring in one *Sharp's* daughter, whom he had unduly withdrawn from her father, and to deliver her in court uncontracted; and then the court will sequester the person, as it was done in *Barron* and *Dennis's* Case. And this is done upon great consideration; for if offenders should have the right of their pretences concluded for them by strictness of law before their offences come to judgment, they would be careless of the punishment, for that they had first obtained their wilful desires. And if a man should be suffered to recover a great sum of money upon a forged bond, and take an innocent man in execution, and keep him in prison, or take his goods or lands in execution, many desperate persons would be encouraged to commit forgery; as one *Spye* did in 4. *Eliz.* where the matter did not appear till after the judgment at law; and then, although it were plainly discovered, the judges made dainty to dispense with the judgment in law, unless the wicked forgerer would deliver the wronged person by his consent; which because he would not, the innocent and the forgerer both continued in prison.

BUT, as I said before, the leading rule in these cases hath been the priority in suit, and that the court is not tied thereunto; for if a suit should be commenced at common law which will directly prejudice the sentence of this court in a matter in issue, the court will usually stay the suit by injunction, as being presumptuous to check with this high court.

BUT in these cases the great judgment of the court is most exercised. For if a man have preferred a bill of perjury, and after call the defendant perjured, it hath been thought inconvenient to stay the action of the case brought for these scandalous words, for that men may file a bill to protect their scandalous words. But if a man will call

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another perjured, and after prefer a bill for the perjury, there it shall be intended that that bill is preferred of purpose to excuse the scandal, and therefore no injunction to be granted in the case; as it was adjudged in *Cliff* and *Jennings' Case*, *M. 4. Jac.*

BUT in *H. 7.* and *H. 8.*'s time, this court did always enjoin the stay of all other courts until they give leave concerning the title any way in question in this court, not suffering any of the parties to commence any action real or personal. As in *7. H. 8.* there was injunction, *quòd non ulterius prosequatur vel prosequi sinat aut faciat aliquam actionem versùs Grinstree et al. seu aliquam actionem com. leg. causæ litis his inter eos pendent.* where the court went to all causes, although not concerning the matter in question; and the precedents are many of that nature.

YET in *fir* — *Egerton's Case* the same was questioned; but after long debate that cause was resolved more to the honour and dignity of this court than any case within forty years before; for there was determined, that any man which stood out in contempt of this court might be enjoined not to bring any suit in any other court whilst he stood in contempt; wherein the court did make this court equal to the other courts of common law, where the person is disabled by outlawry, which is but a contempt of the court.

IT was very much in use in the *lord Egerton's* time, when there were many questions concerning the undue contriving of wills, to stay the probate of wills until the cause were heard; but that was where some pregnant matter appeared to induce the court to suspect some ill courses in contriving the will: for if injunctions should not be granted, it were in vain for the party grieved to sue, for perhaps in strictness of law the will may be a will not forged, and yet framed and made when the party had no disposing memory; as it was in *Tunstall* and *Brackenburie's Case*, which was by the sentence of this court damned.

And

And so *for Randall Brereton's* will, and many others. And this likewise maketh all courts to tune together; for if the ecclesiastical court should give sentence for the will, and this court should damn the will, this would make no good harmony in the justice of the Commonwealth.

§. XXI. OF THE EXAMINATION OF WITNESSES.

THE defendant having answered, and being perfectly examined, and being bound either to attend the court or to be present at the hearing of the cause, the deed in question being brought into the court, or other evidence which may manifest the truth, and foreign suits stayed which may prejudice the judgment of this court, it is fit time to examine witnesses to prove or disprove the matter in issue: and those are examined either in court by the examiner, or by commission in the country. And for examinations in court, there hath been some question, whether they might be taken before the plaintiff's replication, or before the defendant's answer; for if upon a bill exhibited the defendant should stand in contempt, and the plaintiff's witnesses should be aged or sick, it were hard that the plaintiff should lose his suit by reason that he cannot bring in the defendant to answer, which he must do unless he may examine his witnesses during their lives to prove the matter.

YET I conceive in ordinary course, without the perpetual order of the lord keeper or the court, he cannot examine them; and my reason is, for that I find a *Case Pas. 34. Eliz. betwixt sir John Devers v. Thasborne*, the defendant obtained a day to answer by reason of the length of the bill, but it was provided that the plaintiff should have liberty to examine witnesses; and the defendant took no exception for that they were examined before answer;

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whereby I collect, that it was held good at that time to the examination if they were taken before answer. And the Case of *sir Richard Champenowne* against *Wakeman* and others, about the *earl of Devonshire's* will, it was, after much question, clearly resolved, that after answer witnesses might freely be examined at all times, as well for the defendant as for the plaintiff. And as they may be examined in court before any commission be awarded for that purpose, so may they also after the commission has concluded: and one great privilege is granted to examination in court, that the party may exhibit as many and as divers interrogatories as they will, which they cannot do by commission, as I shall shew hereafter.

Now concerning the persons of witnesses examined in court, it is a great imputation to our English courts, that witnesses are privately produced, and how base or simple soever they be, although they be tested *diabolares*, yet they make as good a sound, being read out of paper, as the best; yea although a lewd and beggarly fellow take upon him the name and person of an honest man, and be privately examined, this may be easily overpassed, not easily found out; whereas in ecclesiastical courts the witnesses must be sworn in court in presence of the proctor of the other side at least. But to prevent these inconveniences, the *lord chancellor Egerton* took an order, that every witness which was examined in court should be shewed to the attorney of the other side, and his name and place of abode delivered, to the end that he might be known to be the same person, and that the other side might examine him also if they please.

BUT it is as much wondered, that this court suffereth not the parties to examine the credit of witnesses, to notify to the court what their condition is, for that in the ecclesiastical courts they have liberty at several times to produce witnesses one after another to manifest the credit of witnesses which have been produced; whereof is this rule,

Testes in testes et. in hoc sed non datur ultra;

in which course they examine their fame or disgrace in their whole lives. And the reason why it is not given way unto in this court is, for that causes being for the king, if witnesses lives should be so ripped up, no man would willingly be produced to testify; and therefore many opinions and circuits of judges are extant in this court, where it is adjudged that a witness deposing for the king upon an indictment shall not be questioned for perjury; yea this court hath ordered a great reward to witnesses in this court by yielding their testimonies for the king, as it was in the king's attorney's Case against *Dunnings, Mich.*
4. *Jac.*

YET let it not be conceived by any but that the court will allow exceptions to be taken to witnesses, and their credits to be examined, so that the parties cometh and moves it in court, to the end that the other side may take notice, to examine witnesses to uphold their credit, for that many times *meretrix* may be *testi idonea* of matter done in *lupanario*; and of lewd offences the best men are not always the witnesses. Neither is this any new-invented order, to move the court upon exception to testimony; for in 7. H. 8. the exceptions against the witnesses exhibited in the party of the *duke of Buckingham* and — *Ap Morgan* were committed to the master of the rolls and doctor *Taylor*; so that then the court was more curious, for they suffered them not to proceed to proof, except they conceived their exceptions pertinent; and now the liberty is not denied but in the Dutch cause, wherein are many precedents tending to the overthrow of the antient courses.

BUT this is a firm and constant rule, as well in this court as in all laws, that no man shall be received to except against a witness as incompetent, if he examine him also himself: but of these things I shall speak more particularly, only I was led hereunto by order of shewing forth the witnesses produced in court.

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EXAMINATION of witnesses by commission, is always by men of great worth in the county where the fact ariseth, and were antiently appointed by the court the most eminent men in the county; but of latter times they are chosen by the parties, in the same manner as they are for taking their answers and examinations of defendants; and the commission differeth not much: for the *lord chancellor Egerton* understanding that when commissions were in execution, both parties attendeth with their counsel, and when they suspected a proof made against them, or many times understood by their commissioners, they always drew new interrogatories to cross that proof, which he conceived to occasion much perjury; he therefore made an order, that in all commissions which went forth for the examination of witnesses, they should include all their interrogatories, and the commission should go to examine *super interrogat. inclusis*, and not *ministrand*. Nay, if commissions be in part executed, they cannot add to nor alter any of those interrogatories, but they must still be the same, except it be by the special order of the lord keeper, or of the court.

AND this is held not to be equal and just, for that a man may understand that proof is made against him of something that he is not able to manifest to be apparently false, unless he had articles to examine the same, or could deem beforehand thereof it being false, which no man will presume will be done; and by this order truth will be concealed, and the party innocent extremely prejudiced. But this hath its answer; for the party in jeopardy hath liberty to minister any new interrogatories in court to produce witnesses upon, and so free himself of all great peril, although it be very chargeable unto him; but when there was liberty to minister new interrogatories in the country, the charge was treble, by the long sitting of the commissioners and extraordinary length of books.

• IN time and place the plaintiff is always to be favoured, for the proof resteth upon him, and he sueth for the king; but if he shall have carriage of a commission, and a time and place appointed for the execution, if he shall not bring the commission to the place, and the defendant and his commissioners shall attend at the place, he shall bear their charges; and the defendant, for prevention of such loss, may have a duplicate, which is another commission word for word, or may have a day certain for the execution, to avoid the danger of loss.

AND at the execution of this commission, the commissioners must behave themselves reverently and respectfully one to the other, without any terms of provocation to the breach of the peace; so must the parties and witnesses and every stranger, so that there be no disturbance of the execution thereof; and if it be otherwise, upon certificate of oath thereof, the court will punish them for their contempt.

THE witnesses which be produced at this commission cannot be refused by the commissioners, except that it appear unto them that they be parties to the suit, or be idiots, or *non sanæ memoriæ*; for other exceptions they cannot allow: but their commission being to examine *quoscunque testes*, they know that a party is no witness; and therefore they may refuse to examine a party, or a man that hath no discretion to declare his testimony: and the commissioners' duty doth most particularly appear in *Peacocke's Case*, where it was adjudged, that it was a great abuse in a commissioner to tie the witnesses to the letter of his article, not suffering him to express the whole truth; which agreeth with the rules of the civil law.

AND in that *Case of Peacocke* it was also agreed, that it is not lawful for the commissioners to discover to the parties for whom they are chosen, any matter which any witness hath deposed before them; nor to have conference with the parties, to take any new directions or instructions,

PART III. instructions, after they have entered to take the depositions of the witnesses.

AND one thing is much expected both of commissioners and examiners, that they set down the depositions justly; not to say he deposeth affirmatively or negatively, for it is held no deposition in this court. The place where they examine ought to be private for that purpose, that parties and witnesses may not hear the several examinations of every witness; and they are to take the depositions of the witnesses, and not to receive their testimony written; and all things that tend to secrecy and indifferency, that is a commissioner's duty.

The depositions being taken by themselves (for it is to be observed, that they have no authority to take the same by their clerks; and the *lord Egerton* was wont to say, that none of them was too good to be the King's clerks), the same is then to be ingrossed in their presence, and certified under their seals which were present at the execution, unless some will yield reason to the court why he did not join in the certificate; and then it ought to be returned into the court, as a commission to take the defendant's answer; but being returned to the clerk of the court, and for the most part it is to remain sealed until the cause be published, then it is to be delivered to the attornies to be copied for the clients.

AND if the commissioners have any way unduly behaved themselves in taking or partial setting-down the examinations, or ill-handling of witnesses to draw them from the truth, the party grieved shall have redress before publication: He speaketh afterwards to have redress by suppressing of the testimonies so taken, but the court may punish the abuse.

BUT examining of one witness twice, which is unlawful, or any matter of scandal impertinent to the cause, either against parties or witnesses, without the license of the court, that is to be moved after publication, for that
it

it cannot be had and known till the copies be had and viewed. PART III.

BUT because the producing of witnesses is general both to the examination in court and by commission, I think it best to handle these general heads as extending to both kinds of examination.

FIRST, Who shall be received for a witness?

SECONDLY, How they shall be produced.

THIRDLY, What course may be taken to draw truth from him, and what he is to depose.

FOR the first, it is clear that a party can be no witness; and therefore if a bill be put in against many, and some called to answer, the other cannot be witnesses because they are named parties; and so it was done in *serjeant Hale's Case*: but by order of the court, where the defendant complaineth of his prejudice, and prayeth liberty to examine them, they are exempted from being parties. But the court hath lately taken an honourable order to allow the answer and examining of any persons named defendants against whom there is no proof, but only their names put in to take away their testimonies, which is grown exceedingly common.

AND therefore the wife cannot be allowed a witness against her husband who is plaintiff and defendant, for that they are but one person in the eye of the law; and so it was adjudged in the bishop of *Saint David's Case*, and in *Furebrand's Case* against *Shellicbrand*. But if the defendant's wife be perceived and examined against her husband, and the husband cross-examineth also, so she is examined on both sides, they both have allowed her, and she shall be allowed of; as in *John Rowe's Case*, 3. Car.

THE son may be a witness for the father; but, as the lord *Egerton* said, it must be in case where there were no other witnesses, for otherwise he would have small faith unto him.

THE

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THE servants are good witnesses for their masters in case of riot where they are wounded, and yet are grieved parties, and shall best testify their own wounds; for it is intended that they are most likely to know the injury done against their masters, and their oaths shall be allowed in *odium spoliationis*; as upon the statute of *Winchester*, the party's own oath which is robbed is taken for the money which he lost, but the court will not task them damages upon their own oaths, except there be some concurring testimony.

I HAVE known outlawed and excommunicate persons disallowed for witnesses, and convicted felons; but I know not what authority commissioners have to refuse them, or how they can take notice of their conviction; but they are to leave them to the court, who will disallow them at the hearing if they see cause.

AN infant cannot be received for a witness unless he be above the years of discretion; and the civilians rule is, that *testis non admit. in criminalib. nisi sit vigint. annor.*; but I know witnesses examined of the age of seventeen years I allowed in this court, especially in cases of force.

So any man which hath been legally convicted *de crimine falsi*, as forgery and perjury, cannot be received to give testimony.

AND for the conditions of men which may yield testimony, the king may yield a testimony in any cause; for so did king *James* in many things in the *countess of Exeter's* cause; and did in Chancery by his letters under his signet in the *lord Auberville's* cause.

THE great judges of the realm may yield testimony, but they do that by certificate under their hands, if not by oath; but upon their bare certificate divers men have been sentenced; as jurors, which have been bound over by the judge of assize for acquitting of offenders contrary to their evidence, have been sentenced upon the judges' certificate before whom the acquittal was; but that was only where
they

they were authorized under the broad seal to take their verdict, for otherwise I conceive not that any man should be punished under a certificate without oath.

THE peers and nobles of the realm have been often witnesses in this court; but they say they ought not to be sworn to yield their testimony, but to deliver it upon their honour; a question that I will not dispute, but the present current is against it, only I have delivered my observation. Where they be charged as delinquent, *alieni*, if strangers shall be witnesses, if they cannot speak the English tongue, there shall be an interpreter sworn truly to express their saying; but a Turk and Pagan cannot be a witness, for that he denieth the Holy Gospel, whereupon they are to take their oaths.

THIS shall suffice concerning the first point, Who shall be received to be a witness? In the next place I shall shew how the witness should be produced. And for that, it is certain that any man may come to yield his testimony without compulsion; and howsoever he be now esteemed a forward witness which doth so, yet in former sincere times it was much used, and no process was ever awarded to compel them to be examined, unless the party that desired to produce them will depose that he took them for material witnesses. But of latter times every man may have a process of *subpœna* to testify: but if the party which served the process do not tender the party served his reasonable charges, he is not compelled to appear. The costs being tendered he must appear, or else an attachment is awarded against him, and all other process, as against a contemner: and the witness may appear although costs were not tendered; and upon his appearance and examination the clerk of the court may tax such costs as he shall think fit for his travel and expence. It is a usual course, by reason that the commission gives authority (*testes*), for the commissioners to make a precept directed to the witnesses, commanding them to appear before them at a day and place

PART III. place appointed; and it was held, that if the witnesses refused to make their appearance to be examined before the commissioners by virtue of their precept, that then they should upon service of *subpœna* appear in court at their own charge; for that they have refused the favour of the court; the commission being awarded specially for their ease, that the country people should not be called from their affairs to yield their testimony, as well as for the aliant's ease, to save his purse: but the *lord chancellor Egerton* determined the question, that no man can be compelled to appear unless he be required under the broad seal, and being so required, a witness must have his costs tendered; and therefore the calling by precept is not compulsory, nor shall cause the party to be examined at his own charges. And it seemeth to me that the antient course stood upon good reason; for the commissioners have their authority under the broad seal to call witnesses before them, and their warrant shall be compulsory under their seals, as well as the warrant under the hand of any justices of the peace to call persons before them, and the authority equal.

In the third place, I am to declare how matter required from the witnesses shall be drawn from him. And that is by ministering fit questions unto him, which are called Interrogatories: and those are to be put in court before the return of the process, or otherwise he may depart without being examined, and without danger of contempt: and those must be pertinent to the matter in question, not of foreign matter; for so by examining a witness in one cause, I will discover before publication what he can say in another, which was held a great offence in *Harvy* at the suit of *Backings*: neither must it question the party to accuse him of a crime, for it is an high contempt to make the justice of this court an instrument of malice, and hath been punished by fine and imprisonment, and now always by imprisonment and costs; and it is the folly of the wit-

ness if he shall give any answer to any such scandalous and impertinent question; for the oath ministered to the witness is, "You shall make true answer to such interrogatories as shall be ministered unto you as a witness concerning this cause, without partiality or affection to either of the parties;" so that if the question concern not the cause he need not answer it, whether it be scandalous to himself or to any other, if not concerning that crime in question: but of this in another place, after publication, when it may be discovered.

BUT the great question hath been, Whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories? And it hath been ever held, that the witness's testimony must be truly voluntary, and not constrained; for how shall wilful perjury be assigned upon a constrained oath, which may be done upon every oath? and therefore if a witness conceive that the answering of a question may be prejudice to himself, it seemeth that he need not to answer; for he is produced to testify betwixt others, and not to prejudice himself, where he is produced as a witness. Yet in the Dutch cause the goldsmith apprentices refused to give answer to their examinations, alledging that they were sworn not to reveal the mysteries of their trade; and they were committed until they were examined. But that Case was a Case of State, wherein the Commonwealth was much interested, and I hope will be no precedent to future times; for I can well remember, that I moved the *lord Egerton* in such a case, where a witness gave no answer to the interrogatories, for that he did not depose, which was a manifest refusal; who gave me answer, that he knew no law to compel a witness to speak more than he would of his own accord. If either plaintiff or defendant be slack in examination of witnesses, he which hasteth to conclude the cause may give day for publication. And in ancient times there were three days given to produce witnesses; in imitation whereof the court of chan-

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every giveth to this day three rules before publication; and this court hath always allowed two commissions and a day peremptory. And the rule in antient times was entered in this manner: *dies datus est ad producendum testes primum*, and then *secundum*, and then peremptory.

BUT if the party to whom the rule was granted, desired to conclude the cause either upon one examination or some few, his refusal to examine more witnesses was entered of record; and of late times, if the plaintiff will examine all his witnesses in court, he giveth notice to the defendant by a rule entered with the register, to the end the defendant may sue forth a commission to examine his witnesses, if he please.

By the order of the 38. of *Eliz.* as also by the *lord Egerton's* latter orders made by consent of all the judges, if the plaintiffs after publication forbear prosecution for the space of three whole terms, and produce no witnesses, the cause is to be dismissed, unless he shew good cause to the contrary in open court; or if he do termly make a shew to prosecute, and do nothing effectually, the court upon oath will dismiss the defendants; the same being but a dallying with the rule of the court, to the form of it in shew and not in substance.

AND thus I have run through this treatise of examining of witnesses, wherein I have spent more time than in any other, for that the books of common law do yield small direction for examination of witnesses, and the civilians are therein far too copious.

§. XXII. OF THE READING OF PROOF ON THE
HEARING OF THE CAUSE.

THE witnesses being examined, publication then is to be granted of them by the court, which is the conclusion of the cause; and after that order entered, there

Can be no more witnesses examined: but if the witnesses were formerly sworn, and the interrogatories whereupon they are to be examined put in court, although they be examined after, yet it is the same as if they were examined before publication. But commonly there is in the rule of publication a *salvo* for such as are sworn; for these are those *Fitzherbert* speaketh of: *testis si fuerit in termino, licet deponat post terminum, valet ejus testimonium*; but to produce witnesses after publication, is held a matter very pernicious, and that which, if it were allowed, would make causes infinite.

It is true, that there are some precedents where such examinations have been allowed; but the same hath been either by consent of parties, by reason of the undue entering of publication, to convince the malicious clamour of one of the parties, or to satisfy some doubt to the court, which ariseth out of some scruple of their own conscience wherein the court desireth to be resolved, and not upon the suit of either of the parties: and this is that which is called *ad informandum conscientiam judicis*. For by the consent of parties in the Dutch cause, *Moyse Tryant*, who had witnesses examined against him, and published before the first hearing; and upon notice given by the attorney general that he would examine other witnesses against the next hearing, and that the defendants, if they would, might do so likewise, and only *Moyse Tryant* did so; this was held by the court an implied consent; and the court proceeded and sentenced him upon the testimony of those witnesses examined by consent by implication. But there is no doubt, if it had been a public and actual consent, it would have taken away scruple; for surely *conscientia tollit errores*, and the time of producing witnesses is but an error of producing.

In case where publication is unduly entered, there future examinations are granted; as in the Case of *Wombwell* and *Wombwell* before mentioned, where it appeared that the

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defendants, whom the cause principally concerned, had never any notice that warning was given to examine witnesses by service of *subpœna* for that the defendant served was of confederacy with the plaintiff, and therefore witnesses were newly examined. And in the Case where the king's attorney was plaintiff against *Gunter* for the imposture for pulling pins out of the flesh of a young maiden, after the king's witnesses were published and seen by the king's counsel, the king's attorney suggested to the court that publication was entered without his warrant, which ought not to have been done in the king's cause, and so desired further examination; and because undue publication, *est quasi nulla*.

BUT the judgment of the court in this was of excellent direction, that after publication examination should be stayed until precedents were searched; for that in truth in this case the court will not grant future examination after the parties have seen the books, but it will require, to avoid such a publication, and to examine *de novo* must swear, that he hath not seen the books; and then the names of the witnesses being brought into the court that the other side may know them, the interrogatories being perused by some ground judges that they be not captious, the examination may be allowed. Sometimes the court will give liberty to a clamorous person to convince his malice more than is due unto him. So in the Case between *Rich* and *Wallop*, 13. H. 7. where the plaintiff had liberty to examine after publication, *ad convincendum sui malitium*: and the like to that was *Pasch. 11. Eliz.* to *James Werner* against the lady *Marvyne*; but that was by the queen's express command delivered by her attorney general, in which case she went further to re-examine all the witnesses he had formerly examined, *ad informandum conscientiam consilii*; only there was some care had to avoid subornation or ill instruction, for the clerk of the court himself was enjoined to take the examination, and *justice Weston* to be present thereat.

BUT

BUT for the last, which is for the satisfaction of the court upon hearing, many precedents have been in that kind, but that always when the court hearing the cause findeth it perplexed, and that the truth cannot be discovered without a further examination; as perhaps witnesses are produced in whose custody a forged deed is found, and the party conceiveth that either he delivered it or received it from the forger, and that the testimony of the witness cannot but discover the person; but what he discovereth cannot be seen by him till after publication, and then he can examine no more; upon view of whose deposition another person is vouched, and upon whom the whole cause resteth. In this case the court, being the most excellent searcher of truth, may require the examination of the party before they will give any judgment. So in this wise 13. *Eliz.* did the court, upon hearing the cause betwixt *Rowland Hind* plaintiff and *Lodowicke Breenevile* defendant; and a new day appointed for the hearing the day following. And of this nature, in *Trin. 3. Jac.* was the cause wherein *Nicholas* complained against *Hitchcock* for counterfeiting an injunction from the marches of *Wales*. *Hitchcock* sent one *Windowe* to an attorney at the marches to procure an injunction, who procured it and sent it; but therein mistook the names, and enjoined the defendants instead of the plaintiffs. *Hitchcock*, finding this mistake, made an injunction to the right person, and took off the seal which was the true one, and fixed it to that, and delivered it to one *Wollery* to be delivered to the defendant; who did so, and the defendant served this false injunction. But these persons being unknown to the plaintiff, no man which was examined would charge *Hitchcock* with having the true injunction, and so no likelihood to satisfy any: the court thereupon ordered the cause to stay, and *Windowe* and *Wollery* to be called up and examined, and thereupon the cause to be proceeded in to hearing, which was done accordingly,

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So in *Mich. Term 3. Jac. sir Edward Dymocke* was plaintiff against the *earl of Lincoln* for buying of a statute; and *champerty* being best known to one *Bradshawe*, *Bradshawe* was not examined. The court, upon hearing, finding that the truth could never be cleared without *Bradshawe's* examination, surcease the hearing, and ordered *Bradshawe* to be examined, and then the cause was heard. And in these cases copies of the depositions were given to both parties; which useth not to be in civil causes, when witnesses are examined *ad informandum conscientiam judicis*. And of this nature, although much differing, hath it been, when witnesses have been heard sometimes in open court at the hearing; and the same hath been rather allowed than an examination *ad informandum conscientiam judicis* at the request of any of the parties: for I find 34. *Eliz.* in a cause betwixt *Tayler* and *Holt*, the plaintiff making such a request was delivered; but the witness willed to be present at the hearing: and it is worthy of observation; for such a witness being most material to the weight of the cause, the wisdom of the court will best discern him upon view. And in this kind king *James* examined the *lord Wentworth*, in the *countess of Exeter's* cause; and in *Speke's* Case against *Moore*, a brother of *sir Robert Winwood's* was heard in open court, and much questioned by the court.

BESIDES all these reasons of examining witnesses after publication, there hath been also another course used most unduly, which was an examination *de bene esse*; and such a one was taken in *Booth's* Case after publication: but the same was so sharply reprov'd by the court, and the examiner's boldness to attempt it so bitterly rebuked, as it hath been altogether forborne in these late times.

THUS I have shewed what this court out of their discretion have done, thereby to shew their power; but this great and sovereign arm is not to be stretched out in all cases,

cases, for that would destroy order and course, but must be rarely used, and in great and weighty causes. PART III.

THE parties having all their witnesses published, if they find any undue course of examination used; as unlawful scandal against the parties or witnesses—a witness secondly examined when he was short in his former examination—matter examined merely impertinent to the cause—he that is grieved is then to move the court before the hearing of the cause, when for scandalous matters the defendant shall be committed, and pay costs for impertinency. He shall not only pay costs, but in these cases the matter shall be suppressed: where I may note, there is no scandal but is impertinent; for if it be pertinent to accuse or excuse, it shall not be said to be scandalous; as it was adjudged by the whole court in the Case of *Hala-kenden* against *Abbot*, where the plaintiff charged the defendant, being his tenant, with forging a copy of a presentment; the defendant, to excuse himself of forgery, examined witnesses to prove that the plaintiff's steward of his manor was a forger, which might have tended to his excuse, although the presentment fell out to be forged.

If when there is no presentment, nor cause of reference for consideration of undue examination, the plaintiff doth not get his cause to be heard, in antient times the plaintiff was three several times admonished by the court to proceed to the hearing of his cause; and an entry was always made, *A. B. per cognisat. qd persequendum contra in primo et secund.*; and the third time the entry is, *W. hodie 3. per cognisat. persequendum, eò quòd non comp. defendent. dimittant ab hoc instantia omnia cum expensis factis in quibus nondum taxati condemnat. prædict.*
A. B.

BUT by the order of 18. *Eliz.* the defendant was ordered to attend the clerk of the court; and after publication, if the plaintiff did not procure his cause to be entered

PART III. tered in the general book of hearing within three terms, then the cause was to be dismissed, unless the plaintiff did shew cause to the contrary in open court the term then next following.

THIS general book is kept by the clerk of the court, wherein any plaintiff may enter his cause, after he hath paid to his attorney or to the examiner for the copies of his books after twelvenpence a sheet, as for all other copies beforementioned; and he cannot be received to enter the same in that book, unless he be satisfied: and out of this book the lord chancellor or lord keeper appointeth causes to be heard upon the day of hearing in open court, although he hath power to appoint causes of which he hath notice before they be entered there; but the *lord Egerton* many times set them down in order as he found them in the book. But of these in the next place.

§. XXIII. OF THE SENTENCE OF THE COURT.

THE cause, as I have shewed, is appointed to be heard by the lord keeper, who maketh choice of such causes as he thinketh fitting for the dignity of that court, and for the present time, and relief of the suitor who is in greatest want of justice; and therefore the *lord Egerton*, conceiving that the attorneys best knew the client's cause, gave liberty to them to prefer such causes as their clients which most urged them, which were most earnest, and solicited them to prefer; and those, after the cause required by the king's attorney, were always set to hearing: but if there were not enough to fill the paper, he took them in order out of the general book of hearing. But because it is his charge to set fitting causes for the lords judgment, he many times required those which were of counsel in the cause upon whose judgment he durst rely, to certify him whe-
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ther the cause were fit to be heard: but the same was seldom done; for if the same be not proved, the king hath his fine of the plaintiff; and if proved, the defendants are fined after their offence; so that in all cases that come to hearing the king hath his fine. For if so be the plaintiff do not proceed at the hearing, either by absence, or by silence acknowledge that he hath failed of his proof, the plaintiff shall be fined *pro falso clamore*. If the plaintiff and defendant intreat that they may end the cause, the court will seldom suffer the same, unless there be much nearness of blood or other affinity or neighbourhood betwixt them; in which cases the court sometimes alloweth their agreement; but otherwise they are to pay a fine *pro licentiâ concordandi*. And *sir Edward Coke* moved once to have a fine imposed upon a plaintiff *stultiloquio*; but that was but as one swallow. And in fines *pro licentiâ concordandi* the fine is to be paid by both; but if the plaintiff make the composition without license, the fine ought to be set upon as *pro falso clamore*.

AND cases are now appointed to be heard by the lord keeper after every term for the next term following, at which time he appointeth for every sitting day a cause: and it is best that they be set at the nomination of the attorney rather than by the preferment of followers.

AND the causes so set to be heard, are either set at the request of the plaintiff or of the defendant; or if the defendant desire to purge his reputation by the public judgment of the court, he may as well set it to be heard *ad requisitionem defendantis* as to get it dismissed for want of the plaintiff's prosecution: and in those cases the court will for the most part give the defendant damages if they find him innocent, but punish his boldness the more heavily if they find him guilty; so that he must have a clear cause who presumeth, being a defendant, to press the hearing of the court.

AND

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AND the cause being set down in the especial book, the clerk of the court maketh a warrant to the process-maker to make a *subpœna* directed to any of the principal defendants to hear judgment; which *subpœna* is in the words with the *subpœna* set down before, but indorsed in these words, *ad audiendum judicium ad festam A. B.* The process must be served, and the service of any one is the service of all charged with the same offence; but this notice must be left, and service of process given in reasonable time before the hearing.

AND therefore in the king's attorney's Case against *Worster* and *Watson*, the defendants being bound to be at the hearing were served, and their names mistaken in the process; so that thereby the plaintiffs failed. A second day being appointed for the hearing, a process was left at *Watson's* house four days before the hearing; and this adjudged sufficient warning. And in the Case betwixt *Lenne* and *Swain*, Hil. 3. Jac. the process *ad audiendum judicium* was served upon the defendant the 24th of January, which was the day the cause was appointed to be heard; but other causes having priority that came not to be heard till the 5th of February, adjudged not well served, for that it must be a good service for the 24th of January or not at all.

AND although the judges have denied that the leaving of the *subpœna* at the house was no sufficient process to hear judgment, but sufficient to have process of contempt to give appearance, yet the lord chancellor *Egerton* ever constantly maintained it, for that the defendant is intended to be always in court by himself or his attorney, and therefore an ordinary means of service shall be sufficient; and so leaving the process at the defendant's usual lodging, when he had no house, was held sufficient service in doctor *Alabaster's* Case.

I HAVE said before, the process must be served upon any one charged with the same offence, and that shall be
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the service of all; for if divers men be by one and the self-same bill charged with several offences, as some with forgery, and some with riot, and some with perjury, the service to him that is charged with the riot is no service to him which is charged with perjury or forgery; but it is a good service to him that is charged with the procurement of the riot. Nay further, if several men be charged with several offences of one and the same kind, they must be severally served to hear judgment; and so it was adjudged in the *Dutch* cause, that the transportation being a several offence in every man, as it were so many several causes, every man was to be served severally to hear judgment: and so, at the first hearing, those that were not served were not proceeded against.

BUT sufficient notice being given to any one defendant in the same fact, he must appear by his counsel at his peril; for upon oath made of the service, the court will proceed in his absence; but then the answer of the defendant must be fully read in open court before the lords.

THE time of the lords hearing of causes was heretofore every day in the week, yea many times both in forenoon and afternoon; but afterwards in 8. H. 8. in the time of *cardinal Wolsey's* regency, he first appointed four days in the week to sit in the Star Chamber, and two days only in the chancery: and afterwards in 10. H. 8. the lords appointed to sit in the Star Chamber on Wednesday and Friday for reformation of enormities in the king's courts; and afterwards, about 15. H. 8. there were six of the council appointed to sit in the Star Chamber to expedite the causes, which was to give rules and orders of proceedings; but after that usual course was settled in ensuing times, the clerk of the court sat alone to see ordinary course observed in prosecution of causes upon all the days of the week but when the lords sat to hear causes: by all which it appeareth that this court may sit at their pleasure every day of the week if they please, and may appoint

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point any of the lords to sit and give orders; for sometimes the *lord Egerton* did in that time of the great plague appoint *mr. Mill*, the clerk of the court, to give orders in matters of course; which he did in the end of a term, and was very able to perform the same.

FOR it is a marvellous hindrance to the suit, if some time be not appointed to give orders as well as to hear causes; yet are not the days appointed for hearing to be spent in motions, for that will be very prejudicial to the suit and the king; but their times are to be as faithfully observed as may be, without alteration or interruption. And I cannot but note, that in former times four days were yielded to this court every week, and but two to the chancery; and the place of the lord chancellor or lord keeper was in this court for power, sovereignty, and authority, direction, eloquence, and service of the state, above others; but how fallen to this change I know not.—But to proceed.

CASES which come to hearing are either upon the confession of the defendant, or upon proof or testimony of the witnesses.

AND hearings upon confession are either upon the parties answers or examination, and so immediately appointed to be heard; or after the examination of all the witnesses the plaintiff may warn them all, and proceed only upon the confession.

MANY and usual are the causes heard upon confession of the parties; but they are much the fewer, for that the defendant's counsel at these hearings tieth the party to the bare confession of the defendant both for manner and matter.

AND if any thing be read wherein he accuseth himself, they may and ought require any thing in the answer or examination to be read, as it was in *Dreyton* and *Morris's* Case; for by the plaintiff's entry of the cause to hearing upon confession, he excludeth the defendant in the one case from making of any proof, and in the other case when he waveth the depositions of witnesses from using his proof; and

and therefore good reason that the defendant should use his own allegation for proof.

BUT it is sometimes care for the plaintiff to wave all the depositions of witnesses; yet in *Hil. Term 3. Jac.* I remember in the Case of *Page v. Page*, upon this occasion, for that when the cause came to be heard the defendants took exception that publication was not entered, and therefore they could not proceed upon the examination of witnesses; and thereupon the plaintiff waved the testimony, and proceeded upon the confession.

AND in these cases of confession the defendants have this privilege, that if one defendant confess matter against himself and another, the confession can hurt himself alone, and no other, for he must stand or fall by his own mouth; and as the defendant hath that advantage in the one case, so hath the plaintiff in another, for that if his bill be uncertain, yet upon his confession the defendant shall be sentenced, yea although there were no bill; as it was in *Bruncker's Case*, and since adjudged in the Case of the king's attorney against *Brereton*.

IN hearing of causes upon depositions the plaintiff hath this advantage, both of confession and testimony, for he shall urge the defendants what he can to convict the defendants out of either; and in that case the confession of a defendant accusing himself with another is a good testimony; otherwise, if by accusing another he accuse himself: yet is not that a testimony which will carry a conviction of itself, without some other concurring testimony or violent presumptions; yet is it held ever so much stronger than a single witness, as *oculus testis* is better than *auritus*. But if the plaintiff read a defendant's examination to convict any, the defendant may read at the same examination to all that interrogatory to excuse him; for perhaps he explaineth his own meaning in some other part of the interrogatory: but if the explanation be in another interrogatory, it is most usually allowed. But
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PART III. in *Pasc. 4. Jac.* in the cause betwixt *Jeanes* and *Wolridge*, it was allowed to be read in another's interrogatory; and if that interrogatory which is read by the plaintiff have dependance upon answer, then the other shall be read; as in the Case of ————— in *Hil. 4. Jac.* where by reason that the word *aforesaid* was contained in the article, the former article to which that word related was read for the defendant.

AND in setting down how examinations shall be read, it is fit that I declare my meaning; for when the bill is opened by the plaintiff's counsel, and the answer opened by the defendant's counsel, or read by the plaintiff's attorney, the plaintiff then doth state the question; and then the plaintiff's counsel appoints his attorney to read the proof which is in the cause: for if the plaintiff will read proof made in another court, or in another cause, it is not allowed but by consent of parties; and the same must be moved to the court before the hearing, to the intent that the other side may take notice of it to answer unto such foreign testimony, who could not but be surprised thereby. Yet the oath of a defendant taken in another court shall be used at the hearing in this court to manifest his falsity, if it be moved beforehand, although the defendant will not yield thereunto; as it was held in *Colton* and *Sewer's* Cases. But the records of other courts shall be used at the hearing of causes produced under seal, or proved by copies, so that the copies remain with the clerk of the court; for they are incorporated into the deposition; and if it be otherwise, when it is offered to be read in the court, the party on the other side may take exception, and then it shall not be read.

If the king's attorney put in an information by the relation of a party grieved, the party grieved cannot be used as a witness; but the other side, when he is offered to be read, may except to him, and the court will always reject him. Open partiality discovered in a witness by proof or proximity,

proximity, is good cause to alledge that he shall not be read; so is conviction *de crimine falso*; but falsehood in the same cause is no reason to bar him to be read, but that falsehood may be made to appear in the defendant's defence.

THE defendant hath always as much time to excuse as the plaintiff hath to accuse, and more; and sometimes favour to use divers testimonies in defence, which the plaintiff shall not have to accuse; as the depositions in other courts were used for *Wallis's* defence at the suit of *Salloway* for a forgery whereof he was convicted, which was cited to the king's attorney in a cause of forgery, although the witness whose testimony was offered to be read was ready, and so could not be examined; which course is most honourable, for that the sentence of this court strikes to the root of men's reputations, and many times of their estates; and therefore they always require indifferent witnesses, clear proof, not by relation and double testimony, or that which amounteth to double testimony; as, a witness positive, and accompanied with the presumptions which supply a testimony; or, where there can be no direct testimony, in works of darkness, necessary presumption.

THE proof being read, sometimes in one day sometimes in many, the lords proceed to their sentence, which is always delivered in great silence, and without any interruption, the inferior beginning, and so in order every man, and the archbishop last before the lord chancellor or the lord keeper, if the treasurer be not the supreme judge at the time; in which sentence, if the lords deliver any sentence doubtfully, they may afterwards declare themselves to the clerk of the court; and so it was in *Whittingham's* Case reported by *sir Edward Coke*; and not long since *Hastings' Case versus Darvile*.

THE greater part of the judgments of the presence maketh the sentence; but if they be equal, the voice of the supreme judge maketh the sentence, as I have before related to be judged in the *earl of Northampton's* Case; and

PART III. and so it was in *Westingham's Case*, for the point of forgery of the scoffment and letter of attorney then in question; and also in *Hills and Priestwood's Case*, 44. *Eliza*. And in this sentence the court doth punish the offender, and relieveth the oppressed. The punishment is by fine, imprisonment, loss of ears or nailing to the pillory, flitting the nose, branding the forehead, whipping of late days, wearing of papers in public places, or any punishment but death. The parties relief is by restitution of what is taken away by damages, making acknowledgment of their offence, and asking forgiveness.

FINES are new of late imposed *secundum qualitatem delicti*, and not fitted to the estate of the person; so that they are rather in *terrorem populi* than for the true end for the which they were intended, when fine and ransom was appointed, the ransom of a beggar and a gentleman being all one to the case of the crown, the great detriment of the Commonwealth.

IMPRISONMENT always accompanieth a fine; for if the party be fined, he must be imprisoned, and there remain until he find security to pay his fine, and then must pay his fee to the warden of the Fleet, which is ten pounds a baron, five pounds a knight, five marks a gentleman, five nobles a yeoman; but the yeoman's fee is vanished, the keeper for his gain making every man a gentleman. I name the fee to the warden of the Fleet, because that is the most usual prison; but the Tower is as usual in great causes; and in former times the Marshalsea often, or any other prison that the court thinketh convenient.

Loss of ears is the punishment inflicted upon perjured persons, infamous libellers, scandalors of the state, and such like.

BRANDINO in the face and flitting of the nose is a punishment inflicted upon forgers of false deeds, conspirators to take away the life of innocents, false scandal upon the judges and first personages of the realm.

WHIP-

WHIPPING hath been used as a punishment in great deceits and unnatural offences; as the wife against the husband; but never constantly observed in any case but where a clamorous person *in formâ pauperis* prosecuteth another falsely, and is not able to pay him his costs; *quod non habet in ære, luit in corpore*.

WEARING of papers hath been used in all ages, and before the statute of 5. *Eliz.* was the usual punishment of perjury, but since hath been used as a punishment for oppressors and great deceits.

I CANNOT set down every particular punishment, for that the same is sometimes only the punishment appointed on the act of parliament; as in forgery, the defendant, if he be convicted, is to have the punishment of that law: so for taking away of maids, the punishment of the statute 4. & 5. *Philip & Mary*; and so for maintenance, false tokens, and such like; in which cases the court limiteth no express punishment, but convinceth the defendant, and he is to receive the punishment of the statute. So when his majesty had expressed a punishment in his edict against duels, in his own most judicial and eloquent sentence he expressed no other punishment, but left them to the punishment contained in the edict.

SOMETIMES the punishment is by the wisdom of the court invented in some new manner for new offences; as for *Trafke*, who raised Judaism up from death, and forbade the eating of swine's flesh, he was sentenced to be fed with swine's flesh when he was in prison.

SOMETIMES the opinion of the court of the offence and the offender is held to be a punishment; and then the sentence is ordered to be publicly read at the assize, either of the county where the offence ariseth, or in all assizes, as it was in the case of duels.

THE relief of the party made by restitution of that which is unjustly taken away by force or fraud, is very

PART III. observable in *Seffon's Case*, 10. *H.* 8. where there is a notable precedent, that the defendant dying, the court appointed persons to inventory all goods they found of his, and restored out of them that plaintiff's proper goods, and satisfaction for others out of the rest of the goods of the intestate. And in the case of restitution, the clerk of the court hath no benefit of poundage; whereas in other cases he hath twelve-pence in the pound for every awarded pound. And the judges of the common law have a little strangled in this point, supposing that this court ought not to meddle with the property of goods, or the possession or title of lands. Sure I am, that in the time of *H.* 8. there are a multitude of precedents where cattle were ordered to be restored in kind, or others as goods; and there is a decree of that nature in one *Day's Case* against *Cole*, in 9. *H.* 8. And in latter times for restitution of possession of lands, in *Rowle and Morgan's Case*, 45. *Eliz.* where a possession was taken away by force, the court restored it, and settled the plaintiff in possession: and it seemeth unto me, that it standeth with all reason that if my land be withheld from me by a forged deed, when the deed is judged in the court to be forged, that my land should be restored; and so the court did in 10. *H.* 7. And if by perjury upon an evidence I have let my land, if in this court I convince the witness of perjury, it is strange that this court should not have power to restore me to that they find is taken from me by falsehood. But the former decrees were for the most part not concluding the right but until the other side could recover it, or they shewed better matter to the court; and yet the judges did contest in this with the lord chancellor *Egerton*, in the Case of *sir Rowland Egerton* against ———.

FOR damages to the wronged party this court is the best jury; and when they have justly discerned the wrong, they make the most ample recompence, and requite the wronged

wronged person's labour and travel sometimes with all his injury: yea, an informer hath had for his travel by way of damages a great reward; as one *Pierre Lloyde* had one hundred pounds by sentence of this court against *Cadwallader Price* for embezzling the armour of the country, he being made a deputy lieutenant: and this is the excelling part of the justice of this court, which is accompanied with a most excellent privilege, that the party grieved shall be satisfied before the king, who in all duties in other courts hath his prerogative. This hath ever been infallible, except in *sir Thomas Lake's Case*, where the king and party went hand in hand, because there was sufficient to satisfy both.

FOR giving the party satisfaction by submission, great question hath been, whether it be part of the punishment or of the recompence: for if it be part of the punishment, the king may pardon it; if of the recompence, the party is interested: and I conceive, that where the party is to make a recognition of the offence, or to acknowledge the justness of the sentence, that trencheth only to the punishment, and so the king may pardon it, as he did *sir Humphry Tuston*, at the suit of *mr. Nevill*: but where there is a clause of asking forgiveness, that is not in the king's power; as it was in *sir Thomas* and the *lady Lake's Case*. Yet may the king dispense with the manner, as he did with the *lady Rofs's* acknowledgement, standing in person at the bar; yet was she to acknowledge the wrong, and so did, because the manner sounded to punishment rather than to satisfaction.

THE entry of the sentence is referred to the trust of the clerk of the court, and he only may draw them, unless where the lords appoint the king's counsel to pen the same, or where the king is interested; in which case they may only meddle with the form, but they may not alter the matter unless the clerk be mistaken: and if question arise thereupon, the court must be attended, and pub-

PART III. lically moved. And being entered it is irrevocable, and not to be avoided but by the king's command alone, who seldom disannulleth the matter, but many times pardoneth the punishment.

AND so tender the court is of upholding the honour of the sentence, as they will punish those which speak against it with great severity; as they did *Finch* and *Patridge*, for certifying his majesty upon a petition matter which crossed the sentence of the court in the Case of one *Harlakenden*. And by this great sentence the defendants sometimes are fined, sometimes dismissed; sometimes the cause is left to a *non liquet*, sometimes referred to a trial at law; sometimes the matter complained of condemned, but the persons not sentenced; sometimes the plaintiff fined *pro falso clamore*, sometimes not fined because he had *probabilem causam litigandi*.

§. XXIV. OF THE EXECUTION OF THE SENTENCE.

THE sentence being pronounced and entered, in the next place followeth the execution of the sentence; which consisting of two parts, must necessarily have two executions:

THE fine and punishment, which belong to the king and Commonwealth; and the recompence, which belongeth to the party.

THE fine hath one perpetual certain course; that is, it is estreated into the exchequer, and levied as any debt to the king; and the king hath prerogatives for levying thereof which he hath for any other debt whatsoever, except only that the parties damaged in that cause must proceed for the punishment. The party sentenced cannot be delivered out of prison until he have undergone that, or procured

procured a pardon for it, or given security to the end to undergo it. PART III.

BUT for the parties relief, if the persons be contemptuous, the court hath used divers means of correction to compel the persons sentenced to perform the decree.

SOMETIMES by the king's express letters of command; as in 10. H. 7. the king wrote his letters for the performance of a decree formerly made, which the defendant neglected.

SOMETIMES by commandment to the Tower, being always *crimen læsæ majestatis*. So *Patrick Bellew* was committed to the Tower 10. H. 8. for not yielding a possession, and restoring goods ordered by the sentence of the court.

SOMETIMES by new fines imposed upon them for their contempts. So was *Hugh Cartwright* fined first ten pounds, then forty pounds, then one hundred pounds, in the 6. Ed. 6. for not performing the decree of the court in repairing a chapel which he was ordered to repair for divine service.

SOMETIMES the defendants were enjoined, under a pain or sum of money to be levied of their lands and goods, to perform the decree. So was *Nicholas Fairfax* enjoined under the pain of two hundred pounds in 24. H. 8.; *sir Richard Corbett* in five hundred marks; yea, the *lord Zouch* in two hundred pounds.

SOMETIMES this command was contained in a writ of injunction. So was *Robert Martin* enjoined upon pain of five hundred pounds in 25. H. 8.; and in 15. H. 8. the attorney and solicitor general were commanded to devise a writ to command the bishop of *Norwich* to perform a decree, which was done upon pain of one thousand pounds.

SOMETIMES by writs directed to the sheriff, to put the plaintiff in possession, or to levy the money decreed; yea, the mesne profits of the land decreed upon the plaintiff's goods; of which there is a notable precedent in 10. H. 8. And in the same year one *Bregasse* was

PART III. ordered to be attached till he paid a sum of money ordered by the court; and if he refused, to levy the money of his goods,

SOMETIMES by writ of extent to levy the same of lands and goods; which cause was allowed by all the judges, *Dyer* 15. *Eliz.* and pursued in Easter Term following in *Stubbs's Case*, and settled as a constant case in *sir Richard Egerton's Case*. And whereas it first began with an English writ, a writ was framed by the direction of the lord *Egerton* in this manner: but this writ can never be awarded till the plaintiff be in contempt, and hath refused to pay, being served with process of *subpœna*. •Yea, and sometimes this court compelled a stranger that was indebted to the defendant which was sentenced, to bring his debt into the court to satisfy the plaintiff that which was decreed unto him; as in that Case of *Stetly* against *Dorne*, in 42. *Eliz.*

By these courses no person which hath any thing is freed from performing the sentence of this court; neither is any place free from the same; for if the defendant fly into the kingdom of Ireland, this court hath written letters to command the lord deputy to apprehend him there, and send him over in safe custody; and so one *White* was there attached by a serjeant at arms, and sent over, in the Case of *Hole* plaintiff, for an infamous libel.

AND because that execution is the life of the law, and there is no means to vilify a court of justice so much as to shorten the hand thereof, that it hath not power to compel the parties convinced to perform the sentence; and for that error was grown to such strength before, that by direction of the court in that cause of *sir Richard Egerton*, it was holden a maxim, that this court hath no other means to compel the performance of the decree than by imprisonment of the contemner; and if he would endure imprisonment, the party grieved must remain without remedy. Which error had this growth only during the reign

of

of queen *Elizabeth*; and the reason it grew to such a head in that time, I verily believe, was, for that in many years, in that fast-springing time of religion, the people had perfectly learned that obedience was better than sacrifice, and there was scarce a man found so impudent as would struggle with the sentence of this high court. It therefore behoveth the great judge of this high court to maintain this power to execute the sentence, which was so worthily regained by the industry of the *lord chancellor Egerton*, of whose care and pains in this particular I was more than *oculatus test.* for I can say without boasting, *quorum pars magna fui*; and I have ever rejoiced to travail in a cause so behooveful to the oppressed, and so honourable to the supreme court of justice of this kingdom; and I hope it doth not detract at all from the honour and dignity of the common law, as some without just ground have conceived:

§. XXV. OF COSTS.

THE period of the suit in this court is the payment of costs to the complainant, if he complain upon just ground; or to the defendant, if he be unjustly vexed: wherein I must observe, that if any person be dismissed out of this court, which many times happeneth, for want of due prosecution against him, or in any other case, except by pleading a pardon, the lord keeper and lord chancellor are to tax his costs of course; but how much, or how little, resteth in their discretion, except it be contained in the order of dismissal that the same shall be without costs; which is many times by consent, and sometimes by the sentence of the court. But if upon hearing a defendant be dismissed without any more words, the lord keeper ought to tax him his costs; or if he forbear to tax them, or if there

PART III.

there be no order entered that he shall have no costs, the next lord keeper may tax the same, although long after. But if the cause rests upon a *non liquet*, there are no costs to be taxed on either side; or if the case be referred to a trial at law, or a sentence in the ecclesiastical court, if after the trial or sentence had the cause be returned to this court, no costs are granted. But if the defendant be dismissed, and the plaintiff left to take his remedy by law, then are the defendants to have their costs: but if the plaintiff's complaint appear to be just as he complaineth, for forging a will, and the will be found to be naught and damned by the court, and yet the persons cannot be sentenced as forgers, the defendant, although not convicted, shall be so far from having costs, that they shall pay costs. For so did *mr. Cownes v. mr. Twissall*. And in the Case of one *Allen*, a citizen of London, who had bond from the friends of one of his apprentices in four hundred pounds conditioned for the apprentice's truth, and the apprentice going from him, *Allen* being desirous to make some benefit of this obligation, yet conceiving that if he should sue a bond of so great value, and he being not able to make any great loss appear, his suit would be stayed, he therefore erased the letters in four hundred, and made it forty; for which the friends of the apprentice sued him in the Star Chamber; and the same appearing, would not sentence him as a forger, for that it sounded not to any man's prejudice, but deemed that deed corrupt and void in law; and in this case *Allen* paid the plaintiffs' costs.

If it appear to the court that the plaintiff had *probabilem causam litigandi*, although the court cannot sentence the defendant, if they leave him suspected he shall have no costs.

If some of the defendants be sentenced, the rest shall have no costs, as I have before shewed, unless by the special order of the court contained in the sentence. But if in one bill several persons be charged with several offences,

as some with riots, some with perjury, and some with forgery, and those which are charged with riot are sentenced in the case, those which are unjustly charged with the perjury or the forgery shall have their costs, for that the same was as several bills to that purpose; yet if the same person be charged who is sentenced for the riot, he shall have no costs, because he is to pay costs.

I HAVE already shewed that the convicted defendants shall pay costs to him which sueth *in formâ pauperis*, because he cannot travel without expence.

BUT in antient times it seemeth that it was a rule, that no man should pay costs unless the adversary expended money in the suit; and therefore when the king's attorney prosecuted the cause for the king merely, wherein he never payeth any fees for copies of examinations, or any travel in taking them, but every man in that case labourerth *sans fee*, the defendant was never charged with payment of any costs. But the *lord Egerton* conceiving that those for the most part were the greatest offenders, and many times men of good ability, made a positive order, that costs should be taxed against the defendant, upon a bill of costs preferred; and out of the costs all the clerks should be satisfied their duties: and this was upon the hearing of the cause in 45. *Eliz.* wherein the queen's attorney was plaintiff against one *Harwood* and *Tookey*, for an inhuman usage of a young maid in such sort as that she languished long, and died after the year and a day.

AND it was received as a course, that he which appeared *gratis* without process should have no costs; but that was over-ruled by good reason, as I have shewed before, and those costs are taxed, upon a bill preferred to the lord keeper by the attorney of the party which is to have costs, which his lordship taxeth, and to the taxation subscribeth his name: those bills are delivered to the clerks of the court, as his warrant to grant process for the receiving thereof.

AND

PART III. AND the clerk upon payment of twelve-pence upon every pound which is taxed, and two shillings for the warrant, maketh his warrant to the procefs-maker to make a *subpœna ad solvendum*; which is directed to the persons against whom the costs are granted, and to be paid to him for whom they are taxed.

WHICH if they be made to some person by confederacy who never expended any money in the suit, although he be named in the writ, yet shall the party have the same costs who bore the charge: and sometimes a release is obtained from some mean person without any money paid; and notwithstanding the same person who bore the charge shall be satisfied.

THE attorney ought to prefer but one bill of costs in one cause, unless there be several orders of dismissal; as perhaps one is dismissed upon a demurrer; another, for want of replication to his answer; and a third, upon the hearing; and upon these three several orders of dismissal, several bills of costs shall be taxed.

THE party who serveth this procefs must demand the money of the person upon whom he serveth it, or otherwise he is not compellable to pay it: for perhaps he doth not understand the Latin writ; and therefore it is not sufficient to leave the Latin procefs at his house, as in other *subpœnas* of appearance; for so it hath been many times adjudged: and he to whom the costs are taxed, hath election to require his money of any one against whom they are taxed, and the party who payeth the same may seek his contribution by writ against his fellows out of this court; but the court hath sometimes assisted him against the rest which are fugitives with the plaintiff's procefs, after he hath satisfied him to whom the costs are due, as not long since in *James's Case* against *Wrickham*.

AFTER costs taxed, if the party against whom the costs are taxed die, his executors or administrators are chargeable with the payment thereof; but if he die before sentence,

tence, or before the costs taxed, the costs left; as it was in *ſir Sebastian Havye's* Caſe.

AFTER the perſon is in contempt for non-payment of coſts, an extent may go againſt him, as in caſe of damages; but if he die, and his executors be charged, his teſtator being indebted by many ſpecial ties and judgments, it is a great queſtion, whether the payment of theſe coſts be *devorſie*, as to other creditors upon judgments; and being that it is not, for that the judgment of this court ought to be equal if not ſuperior to any other, and this court upon his obedience muſt protect the executor againſt others, if the perſon againſt whom the coſts are granted will fraudulently convey away his eſtate, that it may not be found by inqueſt upon the extent, or ſtrangers will ſhew forth fraudulent deeds antedated, or made without conſideration, to prevent the jury's finding the eſtate, the court hath aſſiſted the party with their letters to the ſheriff for indifferency, and to take into his poſſeſſion the pretended deeds, and bring them into court; as it was done in the Caſe of *Hay v. Probatt*, and the court gave order for the examination of the fraud.

AND in all caſes of coſts or damages the king having no intereſt, the king's counſel may move for the defendant as well as for the plaintiff, for that it is betwixt party and party, and only matter of intereſt, and not of crime.

§. XXVI. OF A BILL OF REVIVOR.

I HAVE now paſſed through a ſuit in this court; but there happeneth ſometimes that a ſuit is concluded before this time of abatement; and that is, by the plaintiff's death; and if it be a *feme ſole*, by her marriage: in which caſes, the heir or executor in the former, and the huſband and

PART III. and wife in the latter, may revive the suit, and prosecute it to hearing.

BUT if the plaintiff be made a knight, or any other dignity bestowed upon him, that doth not abate his suit, so that there needeth not any bill of revivor in that case. And because many questions have arisen concerning bills of revivor, which is a distinct suit of itself, I think fit to conclude this Treatise therewith. And therefore the first doubt may be, Whether, upon the death of the plaintiff, it be necessary to have a bill of revivor or not? for the suit being for the king, the king's attorney may bring the cause to hearing if he please, and then there needs no new bill; which objection hath been often made.

AND true it is, that the king's attorney may bring a suit to hearing, if the party neglect, or refuse; wherein there is a default in him for which he may be punished; but if it be by the act of God, it seemeth there must be a party in court, to which the defendant must be legally called by process to appear and answer; for if so be the process be served to hear judgment at the suit of the party, and then the plaintiff dieth, the court will proceed for the king, for he was legally called to hear judgment; and so it was held in *sir Gilbert Garrard's Case* against *Ralph Egerton*; and in *Hil. 34. Eliz.* where the plaintiff dying after the process served to hear judgment, it was resolved by the court, that they should proceed.

BUT in the Case of the *lady Gresham* against *Booth*, a day was appointed for hearing; but the process not being served, the queen's attorney put in a new bill of revivor, and prayed that they might proceed to punish the offences, and thereupon they were sentenced. But in case there comes a general pardon, which remits all offences which were not depending to be prosecuted, and a suit depending to be prosecuted, and a suit dependeth ready for hearing, and then the plaintiff dieth;

in

in this case no bill of revivor can be renewed; as it was adjudged in *Drywood's Case*, in *sir Edward Coke's Fifth Report*; which maketh no doubt whether the opinion in *sir Gilbert Garrard's Case* be law, for that something may happen betwixt the service of process and the hearing, which may be pleadable to bar the hearing; and that being, it is necessary a bill of revivor should be put in whereunto the defendant may plead; for pardon cannot be allowed without pleading, and otherwise he cannot have a day in court to plead.

BUT there hath been a great question stirred in *Trin.* 41. *Eliz.* in the cause of *Houghton v. Barron*, where a bill was preferred by *Houghton* the husband before the 39th *Eliz.* for riots; and after the husband died, and the wife put in a bill of revivor, whereunto the defendant demurred; and pleaded, first, that it was pardoned; and then if it were not, yet an executrix could not have a bill of revivor for a personal wrong, but *Actio moritur cum persona*. But the question being cleared, that it was not pardoned, although justice *Glanvill*, upon conference with the rest of the judges, certified that the executrix could not by law revive a suit in this case; yet upon consideration of the precedents of the court, the last day of the term, in the presence of the greatest part of the judges, it was ruled that an executrix might have a bill of revivor; and so had accordingly, by reason the suit was for the king, and so the action died not with the person; which was also adjudged in *Rymans and Brickliff's Case*, where the wrong done to the wife by the husband was punished after the husband's death, upon the husband's father's complaint. And upon this reason I conceive, that although in other courts there may not be a bill of revivor upon a revivor, lest suits should be made perpetual, yet in this court it may be, the suit being for the king; which I submit with reverence to the opinion of the case reported by

PART III. by *sir Edward Coke*, which case I conceive to extend to all civil causes, and not to criminal.

FOR the opinion of the judges is, if a *feme sole* exhibit a bill, and after take a husband, she should not revive a suit, because it was her own folly to take a husband depending the suit; yet by the common practice of this court such bills are revived, and have ever been allowed, for that the suit is for the king; and the heir himself, or his guardian, may, if he be within age, exhibit a bill of revivor in cases where it concerneth the inheritance; as it was in *Gabriel Dennis's Case versus sir Arthur Moynwaring*. And the substance of a bill of revivor is no other but that a suit may be prosecuted in the same plight as it was when it abated; and therefore it needs no answer, unless the defendant can plead in bar a pardon, or any disability of the person; which he may be received to do. But if the offence was pardoned at the first, and the defendant did not plead it, it seemeth he hath surceased his pardon, and cannot be received; as it must be granted after the last continuance, otherwise the court will proceed to hear the cause.

AND thus with as much brevity as this matter would afford, I have made a survey of the court, whereunto much might be added; and that which I have written might be couched in better form and words, which hereafter I shall gladly endeavour to effect; and in the mean time submit this my labour, to be confirmed or disallowed, to men of better judgments; hoping I have set down nothing but truth; having pursued so near as I can in all things the direction and opinion of that famous lord chancellor *Egerton*, whose memory I ever
reverence,

reverence, and to whom I must attribute all my observations, being glad to shroud myself under the protection of his name, *tanquam sub Ajacis clypeo*; by whose favour, yea private and particular fatherly directions, I have been enabled both in my poor understanding and weak estate; *postulans ut si quid superfluum vel perperam positum in hoc opere invenirit, illud corrigat et emendet cum omnia habere in memoriâ et in nullo peccare divinum sit potius quàm humanum.* DRACON, fol. I. cap. I.*

PART III.

* The foregoing Treatise is printed from a MS. in the possession of JOHN TOPHAM, Esq. as far as Part III. Sec. XX. at the beginning of the fourth paragraph, collated with another MS. the property of FRANCIS HARVEY, Esq. from which the latter part is printed.

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No. II.

OPINIONS of Three Eminent Modern COUNSEL on the DOCTRINE of Tacking Prior and Subsequent SECURITIES; and upon the STATUTE of 4. & 5. WILLIAM & MARY, Cap. 16. which respects FRAUDS by CLANDESTINE MORTGAGES.

C A * S. E.

BY indenture of demise dated December 1782, *P.* mortgaged an estate of his called *B.* of the value of near 100*l.* *per annum* to *D.* for securing 700*l.* and interest, and by a subsequent deed mortgaged it to the same gentleman for 300*l.* more, and delivered to *D.* the title-deeds. About December 1786, *P.*'s bond-creditors became greatly alarmed (from reports then circulating of his circumstances) about the safety of their money; upon which *M.* (whose clients and himself were considerable bond-creditors of *P.*) applied to him, and requested he would invest him (*M.*) with a power to sell the estate called *B.* and some other premises in *L.* also, in mortgage to another person (the equity and redemption of both of which was estimated at a considerable value), in order to discharge these bond-creditors. This *P.* consented to, and at the same time assured *M.* that the estate in mortgage to *D.* was not incumbered with any more than the 1000*l.* to him, and accordingly executed a conveyance by lease and release in trust to *M.*; since the execution of this deed of trust it is come out that *P.* had previously mortgaged the

* The following OPINIONS, given by three Gentlemen in the line of conveyancing, who stand distinguished in the profession by the merit of their literary labours already published, have been obligingly communicated for insertion in our *Gazette*. The general importance and novelty of the points therein discussed will, it is conceived, render them a desirable acquisition to the common stock of legal information.

premises called *B.* to *G.* (without title-deeds) for another 1000 l. which with the 1000 l. due to *D.* is thought to be the full value of the premises, by which *M.* and the other bond-creditors mentioned in the deed of trust will lose the benefit of this conveyance as to the estate called *B.* if *G.*'s mortgage is intitled to take the precedence to it, by precluding *M.* from purchasing in the prior incumbrance from *D.* bringing with it the legal estate, and thereby protecting himself and the other creditors mentioned in the deed of trust against *G.*'s mortgage.

Quære. WHETHER *M.* by paying off *D.*'s mortgage of 1000 l. and taking an assignment thereof, and thereby getting the legal estate in himself, and the possession of the title-deeds (he not having had notice of *G.*'s mortgage), would in equity be permitted to hold the mortgaged premises in satisfaction of his own and the other creditors' demands under the deed of trust? or, What construction, from all the circumstances of this case, a court of equity would be inclined to put on the deed of trust, in regard to his right of tacking *D.*'s prior incumbrance to it, in preference to *G.*'s, when it is considered that the bond-creditors did not certainly lend their money with an eye to this estate in particular as a security, but to all *P.*'s property which was liable to them? and, Whether the bond-creditors not being parties to this deed of trust to signify their concurrence to it, it will not be considered merely as the act of *M.* and without the privity of the other creditors, as appears by the recitals in the deed, for the safety of their property? Upon the whole, please to advise, on the behalf of *M.* and the other bond-creditors, what may be done most to their advantage?

OPINION. I AM of opinion, that *M.* and the bond-creditors, by having got a conveyance of the estates by lease and release (not having notice of the second mortgage), may, by purchasing in *D.*'s mortgage of 1000 l. and procuring the title-deeds (by which acts they will have the legal and equitable estate

estate in them) gain a preference against *G.* the second mortgagee; because I see no reason why a simple-contract-creditor should not better his security by getting a real security or mortgage for his debt, and then cover that mortgage or real security from one intervening, by purchasing in a prior security bringing with it the legal estate: and if one creditor may, I know no reason why several should not pursue the same step: and if the law be so (which I consider that it is), then the other creditors may, in the present case, by their subsequent assent, ratify the act of *M.* and make it valid as to all of them. *Vide* Stephenson v. Hayward, Prec. Ch. 310. and Sir John Kedworth v. Jonas Primate, Hardr. 318.

13th April, 1787.

H.

I AM of opinion, that *M.* would not, by paying off *D.*'s mortgage, be permitted to tack the bond-debts thereto in preference to *G.*'s mortgage; but that she would be afterwards let in to redeem on payment of the principal and interest due on the former security. If I am right in thinking so, I conceive the most beneficial mode for the bond-creditors will be, that *M.* the trustee should proceed to a sale, and to distribute the money arising thereby in discharge of the mortgages, and afterwards to the bond-creditor as far as it will extend; but it will be advisable previously to communicate with *G.* as to the intention of a sale, in regard that it is not impossible, from the statement of the mortgagor's conduct in concealing his mortgage at the time of executing the conveyance in December 1786, that he might, when he executed *G.*'s mortgage, conceal the former incumbrance, and thereby forfeit to her, under the statute, his equity of redemption, a discovery of this nature would be extremely awkward, either at, or subsequent to, a sale by *M.*

OPINION.
G.

30th Jan. 1789.

G.

R.

I AM

OPINION.
C.

I AM not surprised to find that the particular circumstances of this case have made it the subject of contrary opinions; there is not a pretence for disputing at this day the rule in equity, that a puisne mortgagee buying in a prior incumbrance embracing the legal estate without notice of an intervening mortgage made, may thereby protect himself against such intervening incumbrance, and tack his own and the first together against it; but questions may frequently arise in regard to the extent or application of that rule to particular cases, wherein the circumstances render it doubtful, whether the last incumbrance is a mortgage within the meaning or reason of that rule: admitting the trust conveyance to *M.* so far as respects the benefit of himself and the other creditors, to come under that description, their right to avail themselves of the protection in question, I conceive, cannot be denied; but a difficulty arises on the nature and consideration of that security, as not being a mortgage or pledge to persons advancing or lending their money on the immediate credit of the lands, according to the distinction expressed by the master of the rolls in his argument in the Case of Brace and the duchess of Marlborough, 2. P. W. 491. And indeed if the rule were strictly confined to such cases, I apprehend the present case would not be deemed within it, as the money for which the lands were made a security by the trust-deed, was not advanced upon the immediate credit of that security; but I cannot say I discover sufficient ground to understand the rule in that strict manner: the master of the rolls, in his argument I refer to, was distinguishing between the case of the puisne mortgagee and that of a puisne statute or judgment-creditor; and as one among the distinctions between them, he spoke of the first as trusting his money on the immediate credit of the lands, and the other not, without meaning, I conceive, to lay down a general restriction upon the rule, which, if adopted *in terminis*, would, in respect of the application to that rule, confound all mortgages,

gages, upon which the money was not originally advanced at the time of the mortgage, with statutes and judgments. The distinction he first mentioned is clear of any such confusion, *viz.* that between a security carrying a right to the land as a mortgage does, and one that does not, as a statute or judgment before execution. I am not aware of any case that confines the rule to a subsequent mortgagee originally advancing the money at the time of that mortgage, or that notices that circumstance as a point of inquiry or importance; the reason of the rule, as generally laid down in the books, marks no such distinction, *viz.* that the subsequent mortgagee has the advantage of the law accompanied with equal equity: for, whether the creditor originally advanced his money on the security of the lands, or afterwards obtains such security for it, the debt is equally fair, the consideration for the security of course equally equitable, and the land equally bound by and specifically pledged for it; and though not originally contracted, the debt may be considered as permitted to subsist on the credit of the new specific security: upon the whole, therefore, I rather incline to think, that the rule is applicable, in general, to the cases where the puisne incumbrancer has a specific lien or security by way of mortgage or trust for payment of money actually advanced by or due to him, without notice of the intervening incumbrance at the time of his obtaining such specific lien; another difficulty seems to arise in the present case, on account of *M.*'s alone appearing to be the person who applied for and obtained the new security; from which it may be urged, that the other creditors, whose debts are comprised in the same security, were strangers to the credit given to that security at that time; but *M.* it appears, was a principal creditor himself, and more interested than any one of the rest in the apparent sufficiency of and credit due to the security. The other creditors are said to have been his clients, and he probably had been con-

cerned for them in their former securities, and looked on himself as bound to apply for further security for them; upon any suspicion of reliance upon the former, a security desirable to him must be supposed to have been so to them, and their assent and credit to the security so obtained, seems accordingly *to be presumed* for their own benefit. Any imposition upon the credit given by him to that security, extended to the credit so implicatively connected with his as that credit cannot be presumed upon any other terms, than those on which he proceeded. If *P.* had not complied with *M.*'s application for securing the payment of the debts out of the lands, it may be supposed, that neither *M.* nor the rest of the creditors would have rested satisfied with their bond-securities, but would have taken some steps for the recovery of the monies due thereon. Upon the whole therefore, as it seems to me that *M.* and the rest of the bond-creditors mentioned in the deed of trust did, under that deed, obtain a specific lien or security on the lands for their debts, without notice of the second mortgage, and that their forbearance of legal proceedings on their bonds, when they began to suspect the obligor's circumstances, may be fairly ascribed to the credit given to the new security obtained by them, I incline to think, they fall under the description of puisne mortgages, within the meaning and extent of the rule above-mentioned, and consequently they have, by purchasing in the first mortgage, obtained a preference to the second, and intitled themselves to tack that first mortgage and their subsequent security together, as against the second mortgagee, so as to retain the legal estate acquired by the first mortgage, till both the debts secured by the first mortgage and that by the ulterior security are satisfied. In *Matthew v. Cartwright*, 2. Atk. 347. the holder of the notes, which expressed that the money to be received was to be secured by mortgage on an estate of the person who gave the notes, was admitted to protect himself against a second mortgage prior

prior to his notes, by purchasing in the first mortgage, though no mortgage had ever been made to him for the money on the notes; so that he had not even a regular trust of lands for the payment of his money, as there was in the present case. We may observe, that on these cases of a puisne incumbrancer purchasing in the first mortgage, he does not require the *aid of equity* to give him the protection desired, that protection depends on equity not interfering to *deprive him* of the estate or interest he has acquired at-law under the first mortgage, which being forfeited and absolute at law, would of course keep out the second mortgagee, supposing equity not to interpose; and there seems to be no ground for equity to interpose in stripping a fair and equitable creditor of a legal advantage he has honestly and fairly obtained over the mere equitable claim of another creditor. But though, upon the grounds I have noticed, I incline to think *M.* and the other creditors under the trust-deed are intitled to hold the lands as against the second mortgagee till both debts are paid, *viz.* that on the first mortgage, and that secured to them by the trust-deed; yet I conceive they cannot make a title to a purchaser without the concurrence of the second mortgagee, in whom I presume the legal reversion is vested expectant on the term demised by the first mortgage, and who, though postponed to them, has, I conceive, a title to redeem on payment of their debts.

MY above opinion proceeds on a supposition that *G.* at the time of her mortgage had notice of the mortgage to *D.* which I presume was the case from her taking it without the title-deeds; for if she had no such notice, then her estate being made irredeemable by the act of the 4th & 5th William & Mary, c. 16. if that estate comprised the whole reversion and inheritance, there remained no interest or equity of redemption in *P.* at the time of the trust-deed, to pass to or to be the subject of the security by that deed, and of course *M.* and the other creditors could acquire no security or lien at all *on the lands* under that deed to

intitle themselves to the protection now desired from the first mortgage as puisne mortgages of the same lands.

March 29, 1789.

C.

Further Opinion on both points, which was acquiesced under, and proceeded upon.

H.

WERE it not that I have transmitted to me herewith an opinion of so eminent a conveyancer as mr. —, corroborated by as decisive an opinion of that great and profound lawyer mr. —, that the third mortgagee cannot by getting in the first mortgage (the second mortgagee not having had notice of the first, and so being within the 4th and 5th William & Mary, cap. 16.) defend himself against the middle or second mortgagee, I should not have considered the question as to the bond material in this case; having been always *myself* clearly of opinion, that notwithstanding the second mortgagee be *expressly* within the statute, that will not affect the equity between that mortgagee and other mortgagees in the same predicament. As I entertain doubts as to the effect of the bond, I will state my reasons for differing with these gentlemen on the last point; as, should I be right as to the effect of the bond, the title may depend upon that circumstance. The principle upon which mr. — and mr. — bottom their opinions on this question is, that if the second mortgagee be within the 4th & 5th William & Mary, c. 16. and her mortgage comprized the inheritance, there remained no interest or equity of redemption in the mortgagor at the time of the trust-deed to pass to, or to be the subject of a security by that deed; and *then* of course mr. M. &c. could acquire no security or lien on the lands *under that deed* to intitle themselves to the protection desired from the first mortgage (*Vide* opinion C.). Now, speaking with deference to that high authority, I should submit that the principle upon which the doctrine of *tacking* rests, is here mistaken; it does not bottom itself upon the foundation of what the mortgagor, making the third mortgage, has

has in him to pass, or be the subject of a security to the mortgagee, and on which he (the mortgagee) may have a lien; but it rests upon the principle that the last mortgagee has advanced his money intending to have a security on specific land, the *lien* upon which *proves defective*, and is seised or possessed of the same or other land of the mortgagor, or a charge thereupon by virtue of a prior legal title, of which he cannot be dispossessed but through the medium of equity; in which case equity permits the third mortgagee or purchaser so possessed to tack the money he has advanced to the preceding security, not to tack his subsequent security to the preceding security. And this is evident from the circumstance that when the preceding security fails by effluxion of time if it be a mortgage term, or by satisfaction if it be a judgment, the lien of the third mortgagee fails likewise; for then the primary equity of the second mortgagee avails him against the ulterior equity of the third mortgagee; but until then, the legal estate or lien being in him (the third mortgagee), not capable of being divested but on a ground of equity, and the second mortgagee having no better ground of equity to divest than his antagonist has to retain, he (the third mortgagee) has an equity in him by which he may rebut the equity opposed to him. In order to display the principle fully, it will be necessary to advert to instances where the doctrine of tacking is practised. For example: *A.* mortgages certain lands to *B.* to half the value, he then sells to *C.* and afterwards mortgages to *D.* who purchases in *B.*'s mortgage; it will not be denied but that *D.* may hold out *C.* *Vide Oxwick v. Brockett*, Eq. Ca. Abr. 355. 5. But if the principle were, that *D.* can have no lien unless *A.* had either a legal or equitable interest, upon which his (*D.*'s) claim might attach, it would be clear that in this case *D.* could not tack; for *A.* had nothing to convey, having previously sold whatever he had to *C.* The same observation would apply if the case put were that of a pecuniary charge by judgment.

To

To set the principle in a more eminent view, consider the Case of *Matthew and Cartwright*, 2. Atk. 347.; there one mortgaged his estate to *A.* and then mortgaged it to *B.* and afterwards borrowed money, &c. of *C.* on notes in these words, "Received of *C.* —l. to be secured on "mortgage of my Stokehall estate." Now it is clear that *C.* in respect of *B.* stands merely in the predicament of only having intended that his money should be secured upon land; for, in a contest with *B.* who is a purchaser for a valuable consideration, these notes could not be considered as a mortgage, but at best only as an agreement for a mortgage, which could not be set up, even in equity, against a mortgage executed: yet *C.* having got in *A.*'s security, the court considered *C.*'s claim in respect of these notes sufficient to rebut *B.*'s equity to call for a redemption of *A.*'s mortgage. Now, if it were necessary that the tacking mortgagee should have a lien, this decision cannot be found; for an agreement for a purchase is no lien against a purchaser for a valuable consideration without notice on a contract executed. To go one step further, a third mortgagee, or a subsequent purchaser (for the principle is the same as to each, a mortgagee being completely a purchaser at law after his interest is become absolute), takes in a prior security that covers as well the estate in which he has the ulterior claim, as also a larger estate, on which he has no claim, it having been unknown to him at the time of lending his money that the mortgagor had such an estate; he shall nevertheless hold that on which he had no lien, as well as that which he has expressly taken as a security, until he is satisfied his debt. But in all these cases, the moment the estate taken in expires, or the security taken in is satisfied, the third mortgagee's right is at an end; if I am right in my conception respecting the principle that governs in the instances put, the security acquired, or rather the lien on the lands acquired by such tacking mortgagee, is not in him in respect of the equity.

of redemption, or equitable interest, or other interest he derives from the mortgagor, but in respect of his own money advanced on a defective security (be the object of that defective security a mortgage, a purchase, an agreement for a purchase or mortgage, or for a lien upon land, &c.); which advance of money does not, in its equitable effect upon the contracting parties, enable the third mortgagee to annex any equitable title he derives from the mortgagor to the legal title got in, so as to extend the continuity of that legal interest got in beyond the period to which its existence is limited on its first creation, upon the foundation of any interest he derives from the mortgagor. The weapon he gets into his hands by getting in the mortgage, is merely a weapon of defence: in truth, he shelters himself in another man's castle, not in his own. He takes nothing from the second mortgagee; he is only enabled to retain what he has got, not from the mortgagor, but from one whose legal title is *paramount* to any equitable claim of the mortgagor, and whose title *cannot* be shaken *at law*.

IF this be the true way of putting the case, independent of the statute of 4. & 5. William and Mary, let us see what alteration that statute makes, or whether it makes any alteration in the principle. The statute (my observations whereon I shall confine to the mortgage clause) enacts, "That if any person who shall once mortgage lands to any person or persons for valuable consideration shall again mortgage the same lands, or any part thereof, to any other person or persons for valuable consideration, the former mortgage being in force, and shall not discover, &c. *such mortgagor or mortgagors, his, her, or their executors, administrators, or assigns, shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, upon the said after-mortgage or mortgages, but that such mortgagee or mortgagees,*"

"his,

“ his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy such *more than once mortgaged* lands and tenements for such estate and term therein as were or was granted and conveyed by the said mortgagor or mortgagors *against him, her, or them, his, her, or their executors or administrators respectively,*” (LEAVING out the word *assigns*) “ freed from equity of redemption, and as fully to all intents and purposes as if the same had been an absolute purchase, and without any power or liberty of redemption.” Now it strikes me, that on the fair construction of this enacting clause (which is penned rather obscurely), the legislature did not mean to intermeddle with the rights of subsequent mortgagees involved in this predicament and struggling for a plank to save themselves from sinking; for I conceive that by the first words, the relief or equity of redemption taken away by the statute, is *that* relief or equity of redemption reserved upon the after-mortgage by the mortgagor, which he (*the mortgagor, or his executors, administrators, or assigns*), they, the assigns, standing precisely in the mortgagor’s shoes, and claiming the redemption of that second mortgage (that is, voluntary claimants, not claimants upon valuable consideration) shall be barred; and this is evident from the latter part of this enacting clause, for such mortgagee or mortgagees, it is there said (having got possession, for that must be implied), “ may hold and enjoy such more than once mortgaged lands,” (against whom?) why, “ against the mortgagor or mortgagors, his, or her, or their *executors or administrators,*” (leaving out the word “*assigns,*”) and they are to hold how? “*freed from equity of redemption, and as if they had purchased absolutely.*” Well, had they purchased absolutely the equity of redemption, Could they have held against a third mortgagee possessed of a first mortgage? clearly not; for they could neither hold nor enjoy until they got in the first mortgage. *Vide Case mentioned before, reported Eq. Ca. Abr. 355. 5.)*

But

But if the enacting clause admitted of doubt, the proviso that follows would put it out of question, that the statute meant to affect only the second mortgagee, and the mortgagor's equity of redemption of such second mortgage: for the proviso enacts, "that if there be more than one mortgage at the same time made by any person or persons to any person or persons of the same lands and tenements, the SEVERAL late or under mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, shall have power to redeem any former mortgage or mortgages, upon payment of the principal debt, &c. to the prior mortgagee or mortgagees, &c. any thing therein contained to the contrary thereof notwithstanding." Language could hardly have furnished words more clearly evincing, that the situation of mortgages holding securities equally defective at law, and standing in the same predicament of having been deceived, were not meant to be affected; the mortgage is only made irredeemable as to the second mortgagee without notice, and those expressly claiming *through him*. But if the words of the enacting clause and the proviso did not so expressly warrant the proposition I contend for, I should submit that the *general principles* upon which other statutes applicable to this subject of purchases and incumbrances, and in respect of other subjects of a *similar nature*, and having a *like object* in view (*viz. the preventing fraud*), would warrant me in contending that this statute would not have been construed to have had the effect attributed to it by the opinions of Mr. — and Mr. —: for I take it to be a clear principle of equity, that statutes of this kind only affect *the legal title*, leaving the parties not affected with fraud, and the subject, open to, and liable to be affected by, *all equity* in like manner as before. Thus, though the registering acts declared that deeds and conveyances not registered should be adjudged fraudulent and void against subsequent purchasers or mortgagees, whose conveyances, though subsequent, were registered; yet,

yet, on the construction of these statutes, it has been held, that a first mortgagee registered may, notwithstanding a mesne mortgage registered, and so I have no doubt that a puisne mortgagee not registered might, defend himself by purchasing an eigne mortgage registered: for such statutes leave the law, except in as much as they expressly alter it, just as they find it; and I take the Case of *Stafford v. Selby*, 2. Vern. 589. 1. Eq. Ca. Abr. 321. 5. wherein lord Cowper refused to assist a second mortgagee claiming an irredeemable estate under this act of parliament of 4. & 5. William and Mary, principally upon the ground that the statute did not concern this equity, when the mortgagor was imposed upon by the second mortgagee (which opinion must have been founded on the ground that the statute left the case open to equity), to be a case in point supporting my construction of the statute: upon these grounds I retain my first opinion, that *M.* and the bondcreditors are safe in their purchase or conveyance for securing their debts, so far as goes to the defending themselves, and holding out *G.* the second mortgagee until the first mortgage and those debts are satisfied; but *P.*'s conveyance to *M.* being in nature of a mortgage, and leaving the estate subject to an ulterior equity in *P.* as to the surplus, the estate will continue subject to that equity, in the hands of all persons affected with notice of *G.*'s title until *G.* is foreclosed; and subject to this observation, I cannot doubt (notwithstanding the great and respectable authorities I am favoured with to the contrary) but that *M.* may safely proceed in the mode prescribed to take the estate, subject, as before-mentioned, to redemption, until foreclosure, notwithstanding the case should fall within the purview of the 4th & 5th William and Mary (should the case even so turn out).

Nov. 30, 1789.

H.

No. III.

CASE on a DEVISE of REAL and PERSONAL ESTATE *.

“ **A**LL the rest, residue, and remainder of my goods,
 “ chattels, and personal estate that shall remain at
 “ my death, after payment of my debts and funeral ex-
 “ pences, together with all and every my messuages, lands,
 “ tenements, and hereditaments, with their, and every of
 “ their, rights, members, and appurtenances, situate, lying,
 “ and being in or near *L.* aforesaid, or elsewhere in the
 “ kingdom of Great Britain, that I shall be seised of in
 “ fee simple at my death, or have any freehold or estate of
 “ inheritance in, I do hereby give, devise, and bequeath
 “ the same, and every part and parcel thereof, unto my
 “ very good friend *mrs. A. B.* of *L.* aforesaid, whom I
 “ hereby make, constitute, and appoint, whole and sole
 “ executrix of this my last will and testament.”

Case on a clause
 in a will, Whether an indefi-
 nite devise (i. e.)
 unattended with
 words of limita-
 tion, containing
 the word *heredit-*
ament, &c. will
 carry a fee-sim-
 ple, or only a te-
 nancy for life?

N. B. THE will is duly executed.

WHAT estate doth the devisee take in the testator's *Quere.*
lands under the above devise?

THE devise to *mrs. A. B.* being indefinite, that is, un-
 attended with words of limitation, regularly gives her only
 an estate for life, if there are not other expressions or dispo-
 sitions in the will clearly manifesting or implying the testa-
 tor's intent to give the inheritance. But I do not find in
 this will any one of those circumstances that are usually ad-

OPINION.
 C.

* In No. XXI. of our former volume we gave the OPINION of Mr. *FRANK WILLIAMS* on a point nearly similar to that of the present Case; and we presume it will be acceptable to many of our readers to have an opportunity of tracing and comparing the learned and ingenious arguments and reasoning of two great lawyers on a subject of such general importance.

mitted to have that operation. Here is no introductory clause, no charge upon the devisee, no limitation over to affect the inheritance, nor any general words *disposing* of the testator's *interest in the lands devised*; for though it has been attempted, in some cases, to give such an import to the word *hereditaments*, yet it was denied in the Case of *Hopewell v. Acland*, Com. Rep. 168. as well as in a much later Case, of which I have a manuscript report. And in the present case we seem to be precluded from extending the word *hereditaments* to the testator's *interest in the things so described*, because his subsequent express reference to the different interests he had in the premises before described, shews that the words used in the preceding enumeration of the estates devised, were by him applied merely to the *subjects* of such descriptions, abstracted from his *estate or interest* therein; and the words in such reference, *in fee simple or estate of inheritance*, only describe the testator's *own interest* in the subjects of the disposition, and do not seem to express or denote the quantity of the estate or interest *given* to the devisee therein. The Case of *Right v. Sidebotham*, Doug. Rep. 730, and the several other Cases therein cited, are very strong against disinheriting the heir by an indefinite devise, even under the influence of a general introductory disposition, and disinheriting legacy to such heir, neither of which occur in this Case; and I cannot say, that I find anything else in it that appears to me to afford stronger ground for implying the fee than these circumstances would do. It perhaps may be contended, that the devise of all the testator's lands, &c. that he should be *seised of in fee-simple*, or had *any freehold or estate of inheritance in*, is tantamount to a devise of all his *lands of inheritance*; under which last expression a fee was held to pass in the Case of *Whitlock v. Harding*, Mo. Rep. 873. But it is to be observed, that in that very Case it is said, *these words went only to the lands, and not to the estate therein*, in a strict construction; but that the intent ap-
peared

peared to pass the inheritance, because an estate for life, *after a term of ninety-nine years previously devised therein to the same person*, would have been of no value. And in Hob. 2. and Godb. 207. the devise is stated to have been of *the testator's inheritance*, and is so cited by Holt, 1. Mod. 104. who says, Moor's Report was *wrong*, and that *lands of inheritance* is only a *description of what lands shall pass*. And it is observable, that the import of the words here is included in *every devise* of any other lands than leaseholds; for a devise of any other lands is a devise of lands whereof the testator was seised in fee-simple, or had any freehold or estate of inheritance in. It may also be urged, that in the disposing clause the word *same* may be referred to the words *freehold or estate of inheritance*, which, however, I apprehend would be a *strain* upon the natural construction of the word; for *same* here evidently refers to the several species of property before enumerated, and the words *or have any freehold or estate of inheritance* only express certain circumstances of their descriptions. The words *and every part and parcel thereof* subjoined to *same*, seem to corroborate its natural and regular construction.

UPON the whole, therefore, as I think words are not to be wrested or strained out of their natural constructions to the disinheriting an heir at law, I chuse to incline to the Opinion, that the devisee in this Case takes only an estate for life in the testator's real estates.

July 7, 1786.

G.

No. IV.

CASE on a SURRENDER of COPYHOLD.

A feme covert being possessed of a copyhold estate, granted for three lives, of which she was then the only surviving one, surrendered the same, and a new grant was made thereof for the lives of herself, her husband, and one of her sons, without any trust being expressed thereof in the copy of court roll.—

OPINION, Whether this grant should be deemed to be accepted for the advancement of the son ? or, Whether he should be deemed merely a trustee for his mother ?

A. B. held an estate, by copy of court roll, for his own life, and the lives of two other persons (named in the said copy) in trust for him; and having occasion to borrow money, obtained a license from the lord of the manor to demise the premises for twenty-one years, determinable upon the lives in the copy; and in pursuance of that license demised the said premises to *E. F.* for twenty-one years (determinable as aforesaid), by way of mortgage. One of the trust-lives died. *A. B.* afterwards died, having, by his will, devised part of the said premises to his daughter *B. D.* (the then only surviving life in said copy) and the residue thereof to another daughter. The mortgage remained upon the estate at the time of *A. B.*'s death. *C. D.* (who married *B. D.* the daughter of said *A. B.*) after the death of said *A. B.* resumed the said copyhold estate, and added his own life and the life of one of his sons (an infant) in the said premises; but not being able to pay for the renewal without borrowing money (and *A. B.* not being possessed at the time of his decease of personal estate sufficient to answer his debts), obtained license from the lord of the said manor, for himself and his wife, to demise the said premises for twenty-one years; and accordingly they demised the same to the said *E. F.* for securing 300*l.* and interest (the former term granted by said *A. B.* to said *E. F.* being nearly expired at the time of the decease of said *A. B.*). The mortgage so, as aforesaid, made by said *A. B.* to said *E. F.* was cancelled at the time of said *C. D.* and wife's making the last demise to him; but the money secured by the former mortgage, and the money paid

paid for the renewal by *C. D.* was the consideration of the last mortgage. *C. D.*'s son is not named in the copy in trust for his father, and, by the custom of the manor, estates go to the lives in the copies, successively, as they are therein named, except such lives are named in trust.

WHETHER *C. D.*'s son will, in equity, be considered Quart. as a trust-life in the premises, though he is not so declared to be in the copy? If not, Will he (in case he should survive his father and mother, who are both named in the copy before him) be intitled to take the estate, discharged of the sum due upon it, at the death of his grandfather *A. B.* and of the further sum taken up by the said *C. D.* for the purposes aforesaid? and, Will that part of the estate given to *A. B.*'s other daughter (and which she now holds for the life of *C. D.*'s wife) be, in equity, subject to the payment of a proportionable part of the mortgage-money due upon the whole estate at the death of *A. B.* and which hath been since paid by *C. D.* and charged upon his part of the estate only as aforesaid?

N. B. C. D. and wife, for the better securing the money lent them for the purposes aforesaid, have surrendered their estate and interest in the premises to the mortgagee.

THE general rule is, that where a person purchases OPINION. copyholds for lives, in the name of other persons from *C. whom no consideration moves, there such other persons are considered as trustees for the purchaser, paying the fine, though no trust is declared, notwithstanding the custom of the manor that the lives in the copy shall take in succession. *Vide* 2. Freem. Rep. 123. 1. Atk. 385. But it is otherwise if the purchase is in the name or names of a child or children of the purchaser, especially if such child or children be an infant or infants, and unprovided for: there such purchase is considered as an advancement in respect to such child or children, and not as a trust for the

the parent. *Vide* 2. Vern. 19. *Mumma v. Mumma*, 1. Atk. 386. *Taylor v. Taylor*. And in the present case, I think the circumstance of the old estate being in the wife, and of a renewal being upon a surrender *from her* with her husband, makes it stronger in favour of the child, as it may be presumed that the mother agreed to surrender her estate in order to have her child's life taken in for the benefit of that child, and such child may therefore be considered as a purchaser under her. For these reasons I incline to think, that the renewal in the present case, as to the son's life, may be considered as an advancement for that son; and consequently, that the father and mother had not power to charge the estate or make it a security further than during their own lives. *Vide* the Case of *Back v. Andrews*, Chan. Prec. 1. and 2. Vern. 120. As to the second point, had it rested merely upon the original mortgage, I should have inclined to the opinion, that the security of the term of twenty-one years being determined, and the mortgage itself cancelled, and a new security accepted by the mortgagee, no part of the estate remained liable under the first mortgage. But I think the whole estate was liable upon another principle; namely, as assets in the hands of the executors: for it is held, that as well copyholds for lives as freeholds shall go to the executors or administrators. *Vide* 2. Vern. 264. *Rundle v. Rundle*. Now this, I conceive, must be by considering such estate within the statute 29. Car. 2.; and then they of course, by virtue of that statute, are assets for payment of debts; and upon this ground I consider the part of the estate devised to the other daughter as liable in equity to its proportion of the testator's debts, and consequently of that due upon the mortgage made by such testator.

Dec. 7, 1779.

C.

SINCE

Further
OPINION.

SINCE I answered the Case respecting the copyholds, I have met with a manuscript note of a Case in 1770*, determined by the then lords commissioners of the great seal, wherein they held, that a copyhold taken in the names of children was not an advancement but a trust for the father. Their determination seems to have been grounded principally on the *leases* granted by the father, which they seem to think rebutted the implication of his intending it as an advancement for the children. I doubt how far the general conclusion would hold against the many prior respectable authorities; but I think the Case warrants me in altering my Opinion upon the present Case, so far as to think *E. F.*'s security good against the estate for life of the son (whether that be considered as an advancement or not), after the answering of the debt so secured, especially if there is any proof of the application of any part of the money in obtaining that renewal in which the son's life comes in.

London, Dec. 9, 1779.

C.

* See Dickinson and Shaw.—² Copyholder for three lives. First life paid the fine, and, according to the custom of the manor, was intitled to all the benefit, the other two lives being only trustees for him. The defendant was the surviving life, and had by persuasion got possession, but was decreed to account to representatives of first life, and surrender the estate accordingly.

No. V.

CASE on a REVOCATION of a WILL.

A testator by his will charged his real estate with the payment of his debts; but it being necessary, to give effect to his will, to suffer a recovery of part of his estates, and levy a fine of other part thereof, he executed a lease and release for making a tenant to the *præcipe*, and covenanted to levy a fine; the uses of which fine and recovery he declared to himself in fee. The same was completed in the testator's life-time; but before the summons in the recovery was made out, he died, without having republished his will, he having been in a great measure prevented by the means of the husband of his heir at law.—
OPINION, Whether the recovery was complete at the death of the testator? and, Whether the fine and recovery, under the special circumstances of the Case, amounted to a revocation of the will?

J. W. being dangerously ill, on *Friday 2d February* instant duly made and published his last will, and thereby charged his real estate with the payment of his debts. It being thought necessary for him to suffer a recovery of the greatest part of his estates, and a fine of other parts thereof, in order to effectuate the devises in his will, he on Wednesday the 7th executed a lease and release to make a tenant to the *præcipe* for suffering a recovery, and a covenant to levy a fine, the uses whereof were respectively declared to himself in fee. He then gave his warrant of attorney, and acknowledged the fine before commissioners. The tenant appeared *at bar the 8th*, and the fine was on *that day* passed through all the offices and completed. The testator fully intended to republish the will he had before made, after the return of the summons; but he unfortunately expired early on the morning of Saturday the 10th instant, not having effected his intention, without issue, leaving a widow and a sister (the wife of *J. L. esq.*) his heir at law. His personal estate is very inconsiderable, and not nearly sufficient to satisfy his specialty debts.

THE entry was returnable the *first return*, it is now at the alienation office, the king's fine is paid, but the attorney-general's hand is not procured, the summons is not made out; but if it is, it will of course be returnable *Friday the 9th, the fourth return*. The vouchee died about two o'clock on Saturday morning, the *day after the return day*.

WILL the recovery in its present state, and if nothing further is done therein, the summons not being made out, and the fine (which is completed), be deemed a complete and perfect recovery? and, whether it be a complete recovery or not, Will it be deemed a revocation of the will, as to the estates therein respectively comprised? or, Will the execution of the deeds to make the tenant to the *præcipe*, and the covenant to levy the fine, amount in law to such revocation? or, Can it be said (the term being esteemed one day in law) that the recovery (supposing that it is now perfect) shall have relation to the first day of the term, and therefore shall not overturn the will which the testator (as can be clearly proved) fully intended should be carried into execution?

1. *Quære.*

I APPREHEND the recovery cannot be complete and effectual, if nothing further be done in it, the summons not having been made out, nor any writ of *seisin sued* or executed; for till execution of the judgment in a recovery, it is held to be of no force or validity. *Vide* 1. Wilson, 55. But, I take it, the fine and the conveyance for making the tenant to the *præcipe* for suffering the recovery, are in law revocations of the antecedent will, as to the lands respectively comprised therein. (*Vide* *Dister v. Dister*, 3. Lev. 108. Lord Lincoln's Case, 1. Eq. Ab. 411. Marwood and Turner, 3. P. W. 163. *Darley v. Darley*, 3. Will. 6. and the Cases and principles referred to by Lord Hardwicke, 2. Atk. 803.) The said conveyance and fine, I understand, were clearly *subsequent to the will*; and therefore the relation of the recovery to the first day of the term, could it be supported, I apprehend, would not prevent the revocation effected by them. But no such relation could, I think, have been admitted, had the recovery been perfected; for judgment cannot be given till *after the day on which the writ of summons must be returnable*,
the

OPINION.

the vouchee appearing by attorney. *Vide Wynne v. Wynne*, 1. Will. 42.

WHEN mr. *W.*'s illness became alarming, his brother-in-law, mr. *L.* came to his house, bringing with him his wife and daughter. Mr. *W.* sent for an attorney in his neighbourhood to make the will above-mentioned; but it was with difficulty he got admittance to the testator, mr. *L.* using every endeavour to prevent any person from seeing him on business. On *Wednesday the 7th*, when the attorney came with the deeds and warrant of attorney, mr. *L.* asked him what business he had there, and told him he knew there was some dark under-hand work going on, and that he should not see mr. *W.*; and it was not till after the testator sent word to mr. *L.* that *he was still master of his house*, that the attorney could have access to him. While the deeds were executing, mr. *L.* his wife and daughter burst into the room. He told the testator he was a dying man, shewed him his sister and niece, said they were his flesh and blood, that it would be a most enormous crime to disinherit them, with many other expressions equally violent. This conduct, as it may be imagined, greatly agitated and terrified the testator, who was in the last stage of a very rapid decline; and there is but little doubt it hastened his dissolution. The attorney, on Friday evening the 9th instant, attempted to go into mr. *W.*'s room, in order that he might republish his will, but was prevented by mr. *L.* coming up, and declaring he should not see him without his being present; and as mr. *L.* with his wife and daughter had before broke in upon the testator and terrified him most exceedingly, Mrs. *W.* and a female friend would not risk the agent's going into the room with *L.* fearing his turbulence might occasion mr. *W.*'s immediate death, and when the attorney was gone, mr. *L.* immediately locked up the back stair-case and doors to prevent his coming near the testator, who expired

pired about two o'clock on the Saturday morning the 10th instant. Mr. *W.* throughout the whole course of his illness, and to his last moments, was perfectly sensible; and declared, that the express intent and purpose of the recovery was, that he might be able to pass his lands by his will: and the attorney has no doubt, if Mr. *L.* had not been in the house, he should have found no difficulty in getting the will republished; but he guarded the room-door like a prison. The day after Mr. *W.*'s death, Mr. *L.* had a minute of the recovery in his pocket, and told the attorney he knew of it as soon as he did it; there can, therefore, be but little doubt that he took those brutal measures to prevent the republication of the will, his wife being the testator's heir at law.

If you should be of opinion that the will, as to the real estate, is in law revoked by the recovery and fine, Will not a court of equity, considering the above circumstances, establish the will, as there is no doubt but the testator would have republished it, had he not been thus prevented by Mr. *L.* and who, in right of his wife, will be a considerable gainer by Mr. *W.*'s intestacy?

2. *Quere.*

THE Case of *Marwood v. Turner*, cited in my Answer to the First *Quere*, is an instance of a recovery suffered by tenant in tail to the use of himself in fee, being held, *even in equity*, a revocation of his will respecting the same lands. And Lord Hardwicke, in the place I have above cited, after stating the common Cases of revocation, says, "the courts have gone further, and held, that if a man was seised in fee, and afterwards, thinking he had only an estate tail, suffered a recovery in order to confirm his will, yet this is a revocation of it." I am not apprised of a Case that goes so far in regard to a recovery suffered immediately after making the will, and avowedly to establish the testator's power of making such will, in consequence of his being informed it was requisite for the purpose. But after such

an

an Opinion delivered by lord Hardwicke, it is too much for me to say that the deeds and fine in the present case, though made in support of the will, may not be considered as a revocation thereof, *even in equity*. But considering that revocations of this nature are not *express* but by *implication*, proceeding on a presumption, that the testator would not have made a conveyance, or altered the estate, *without an intention to revoke his will*, as lord Hardwicke himself observes, 3. Atk. 748.; and that *parole evidence* is admissible to *rebut an implication*, *vide* Dougl. Rep. 39. and 40.; I cannot help thinking there is very strong ground in the present Case for equity to establish the will, if there is evidence of what I think the coincidence in proof even affords a presumption, that the testator's declared intent in suffering the recovery was to enable him to pass the lands by his will, and of his meaning to republish that will, and of the circumstances above stated respecting the behaviour of his brother-in-law in preventing such a republication. These ingredients seem to me to distinguish this Case, in an equitable view at least, from all those I have cited, or that have occurred to me on the point, and to take it out of the general reasons and principles of implied or constructive revocations. The testator's declared intent in the recovery and fine to establish his will in this case, the means used to prevent his republishing it, and the interest of the creditors under that will, are circumstances that strongly concur, in my opinion, to entitle that will to the support of equity against the artificial reasoning, which implied legal revocations are founded.

Feb. 17, 1787.

Q.

No. VI.

CASE *ona* TERM ATTENDANT UPON THE INHERITANCE.

IN cases of any difficulty or importance I generally chuse, for the greater satisfaction of the parties interested, to accompany my Opinion with the reasons on which I found it. It is with this view that, in delivering an Opinion in the present Case, I shall begin with a consideration of the three points on which I apprehend the Answer to it must turn; the result of which consideration, applied to the particular circumstances, will produce my Answer to the Question before me. The Question now put to me appears, I think, to depend on the following points: First, What kind of connection or relation there is between the owners of a term, and of the inheritance that forms their union in equity, or gives the former the quality or capacity of being considered as attendant on the latter? Secondly, Whether, supposing a term to be properly circumstanced in regard to the ownership of it to be attendant on the inheritance, a declaration of trust that it shall be attendant thereon is requisite to make it so? Thirdly, Whether if the owner of the inheritance of lands, upon which there are terms attendant in consideration of equity, deviseth those lands generally by a will not executed in such a manner as to pass the inheritance, it will sever those terms again from the inheritance, and pass them as personal estate?

OPINION, Whether a term attendant upon the inheritance will pass by a will not executed so as to pass the inheritance itself?

C.

Points of the Case.

As to the first of these considerations, I do not recollect any Case wherein it has been the subject of judicial discussion: my sentiments upon it, therefore, must be drawn rather from general principles, and the grounds upon which the court of chancery appears to have adopted the union of terms with the inheritance, than upon any particular Cases or decisions

decisions upon the very point. The attendancy of terms on the inheritance is originally unknown at law. There, strictly all terms, whilst they subsist, be the beneficial ownership in whom it may, are terms in gross, separated from the inheritance as a distinct and different species of property, because the law in strictness takes no notice of any ownership distinct from the legal estate. But, at law, where the legal ownership of the inheritance and that of the term come to meet in the same person, undivided by any intervening legal estate in another person, there (save in some special instances) a complete legal union, or coalition, takes place; and the term, which before was personal property, falls back again into the inheritance, and no longer retains any existence distinct from that. In equity, another kind of ownership arises into notice; namely, an equitable or beneficial ownership, as distinguished from the mere legal title; for the former is very frequently in a different person from that in whom the latter is vested. This is the case wherever one person has an estate vested in him by the rules of the common law, whilst another is entitled to the benefit and advantage thereof. This latter kind of ownership is the great object of our courts of equity; which, in order to preserve as near a conformity as possible between the rules of legal and equitable estates, and avoid the perplexity and inconvenience which would necessarily result from the application of two different systems of property to the same subject, generally regulate the latter by analogy to the established rules and regulations which at law govern and prevail in respect to the former. Now, from this principle of general analogy between the rules of legal and equitable property (which is too well known and acknowledged to need the citation of any authorities to prove it) arises this conclusion, That where the beneficial or equitable ownership of a term and that of the inheritance meet in the same person, undivided by any intervening beneficial interest in another

another person, there an equitable union takes place, and the term, which before was personal property, becomes annexed to the inheritance, and attendant upon it as part of the same estate and property, unless the owner expresses his intention to the contrary: for an expression or clear manifestation of a contrary intention by the owner of the property would, I apprehend, prevent such union of the term and inheritance; because one great and constant aim of our courts of equity, in regard to property, is to effectuate the manifest intention of the parties interested therein, and who have power to dispose thereof. Now this attendancy of the term, where no trust is declared for that purpose, is merely by construction in equity; but equity which aims to effectuate, will never make a construction contrary to the declared intent of the parties interested. But supposing no expression of the owner's intent stands in the way, but that matter rests quite indifferent in that respect; then I conceive, upon the principle of analogy above noticed, a constructive attendancy of the term takes effect of course, wherever the beneficial ownership of the term is not divided from that of the inheritance by any intervening beneficial interest in any other person; just as at law a term generally becomes extinguished in the legal inheritance when they meet in the same person, and no legal estate or interest in any other person intervenes to keep them asunder. Indeed the generality of this conclusion remains to be qualified by observing, that equity will not make mere constructive union of the term and inheritance against creditors, so as thereby to deprive them of any benefit they would have of the term for payment of their debts; nor will it interfere on behalf of any intervening incumbrance or equitable interest to prevent the union of the term and inheritance, to the prejudice of a fair purchaser of the inheritance for valid considerations, without notice of such intervening incumbrances or interest, so as thereby to deprive him of any use he might otherwise make of the term for

for the protecting of the inheritance against such mesne claims. But as neither of those qualifications occur for our attention in the present Case, I think it needless to enter into their particular reasons or distinctions. Lord Hardwicke, *Villers v. Villers*, according to a note I have been favoured with of his argument in that Case, observes, that *terms* to attend the inheritance were invented partly to protect real estates, and partly to keep them in a right channel; so that by this means the dominion of real property is kept entire. Now I do not see that any other than terms so circumstanced as I have mentioned are applicable to these ends; at the same time that the attainment of those ends manifestly requires the attendance of terms when so circumstanced for that protection from mesne incumbrances, and implies of course that the ownership of the term and of the inheritance should not be severed by any intervening beneficial interest in any other person known to the owner of the inheritance at the time of his purchasing it: and the keeping real estates in a right channel, and preserving the dominion of them entire, equally supposes the same coincidence in ownership of the term and inheritance; otherwise they could not be made to flow in one channel, nor the dominion of them be kept entire. And wherever the beneficial ownership of the term and the inheritance are not separated by any intervening beneficial interest known to the owner at the time of his purchasing of the inheritance, the attendancy of the term upon the inheritance becomes essential to the answering the above ends; for without such attendancy, property in the same lands united in the same owner would take different channels, and the dominion of real estates, instead of being entire, become split and divided between the personal and real representatives; and, indeed, leave the real representatives very little but the mere name of property; for an inheritance expectant on a term of any considerable duration is of very little value. So necessary,

sary,

fary, therefore, is the attendancy of terms, under the circumstances above-mentioned, to keep real estates in a right channel, that the very existence of real property, as distinguished from the personal, seems in a great measure to depend upon it: for as there are few estates in which there are not some such terms, if they are not to be considered as attendant, the whole substance and value of the estate would in them devolve to the executor, as personal property; whilst the heir, or real representative, would be left destitute of every thing but the shadow of the inheritance. In answer, therefore, to the first of the three points above proposed, I think we may be satisfied with this general proposition, that the union of the beneficial ownership of a term, and of the inheritance undivided by any beneficial interest in any other person known to the owner of the inheritance at the time of the purchasing it, constitutes that connection or relation between them which is the ground of the term's being considered in equity as attendant upon the inheritance; and that it stands indifferent in this respect, whether the legal estate of the term be in the owner, and the inheritance in the trustee, or the case reversed; for the connection in the ownership is substantially the same; and consequently the same calls for the attendancy of the term to keep real property entire in one channel, subsist in both cases.

THIS brings us to our second point of enquiry, *viz.* Whether, supposing a term to be properly circumstanced in other respects for attendance on the inheritance, a declaration of such a trust is requisite to make it attendant?

Now, here we may observe, that if the protection of real estates, or the keeping real property in its right channel, and the preserving the dominion of it entire, were not desirable ends, and such as appear intimately connected with some general convenience, the attainment of them would be no object of a court of equity, nor would they have operated in that court as a motive for the introduction of terms to attend

the inheritance; which lord Hardwicke, as I observed before, ascribes to them: but if these ends were convenient and desirable, which, I think, is very unquestionable (see the attention paid to them by our court of equity), it is but reasonable to presume every owner of real property to have them in his intention and wish, unless he declares the contrary; the utility of these ends remains the same, whether a man expresses his intent to attain them or not; and therefore, for any thing that appears to the contrary, the general ground upon which equity considers terms as attendant on the inheritance, subsists in one case as well as the other. Indeed, as far as the intention or assent of the owner is requisite to effect or complete such attendancy, it is but equitable to infer it from his silence; for it would be injurious to impute to any man a want of assent or inclination to what generally appears to be convenient and desirable, unless he expresses it himself. The owner, indeed, may prevent the constructive coalition of the term and inheritance, if for any particular purposes he thinks proper so to do, and keep them as distinct as they were at the time of his acquiring them, by declaring his intention to be so; for such declaration precludes all ground for construction in equity, and puts the matter entirely upon the footing of his own opinion, which certainly he has a right to make; and whether it is more or less convenient in the end than that which equity would have presumed for him, is immaterial; for *quilibet potest renunciare juri pro se introducto*. All this reasoning in support of the attendance upon terms proceeds on grounds independent of the owner's declaration of such a trust, and therefore is applicable in its full force to those cases where no such declaration exists: but here is not the same necessity for our resorting to general principles for our satisfaction on this point of enquiry, as there was in the first, because there are several decided cases that put this matter out of question,

tion, and are direct authorities, that where a term is, in other respects, properly circumstanced to be attendant, equity will consider it so, though no such trust is declared; and that indifferently, whether the term be in a trustee and the inheritance in the owner; or the term in the owner and the inheritance in the trustee. The Case of Tiffin v. Tiffin, 1. Vern. 1: is an instance of the former kind; and that of Douce v. Duinsfall, 1. Vern. 104: of the latter. Add to this the still later Case of Goodright v. Sales, 2. Will. 329.; which Case was decided upon the same principle even in a court of law.

THIS brings us to the last of the three considerations above proposed, Whether a general devise of lands by a will not executed so as to pass the inheritance, will pass terms that are in construction of equity attendant on the inheritance?

AND here I think it quite unnecessary to enter into a discussion of the arguments which present themselves on this point, as I conceive the Case *Whitchurch v. Whitchurch*, 2. P. Wms. 236. Gil. Eq. Rep. 168: has sufficiently settled it; in which Case it was held by the master of the rolls, and his decree was afterwards affirmed upon an appeal to the lords commissioners, that a general devise of lands by will not executed so as to pass the inheritance, should not pass a term which in construction was attendant thereon, notwithstanding it was urged as a great hardship, that because all would not pass nothing should, and that equity should interpose to disappoint a will, which at law would have carried the term, and that against a very near, in favour of a very remote, relation. This decision was grounded on general principles; applicable to almost every case of a devise in general words by a will not executed, as required by the statute of frauds to pass lands. They are pretty fully stated in Gilbert's Reports, to which I shall refer for them. Indeed, if this were not the doctrine, the legal solemnities required by the statute of frauds for devising of real estates might soon become useless and ob-

solete; because, by means of such terms, such lands would essentially and substantially pass under the denomination of chattels, and leave nothing but the name of the inheritance to the protection of these solemnities.

THE conclusion, therefore, from our enquiries upon the above three points, appears to be, that wherever the beneficial ownership of the term and that of the inheritance are not severed or divided by any beneficial interest in a different person, there the term is in construction of equity attendant on the inheritance, unless the owner prevents it by a declaration to the contrary; and that terms so attendant will not pass by a general devise of the lands in a will not executed so as to pass the inheritance to the heir at law.

NOW, to apply this conclusion to the present Case, we are first to consider, whether there was any intervening beneficial interest in any other person to divide the beneficial ownership of the term in question from that of the inheritance? and if not, Whether the owner has expressed any intention that the term should not be attendant on the inheritance?

IN regard to the first, I must take it for granted, that there was no intervening interest in any third person to divide the ownership of the term from the inheritance; for I am told; that the rent reserved by the trustees of lady Madox's will upon the terms granted by them to sir Andrew Chadwick, were afterwards purchased by him; so that no beneficial interest remained in the reversion reserved upon those terms out of the original terms from which they were derived; but as I have learnt this only from verbal information, and have not seen how or when this rent was purchased, my present opinion must be understood to be given subject to the result of a more particular enquiry into this matter; but at all events I conceive, that that part of the decree above stated which determines in favour of the heir at law as to the three houses which were declared to be attendant; proves that, in the opinion of the court, there was no intervening outstand-
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ing interest between the ownership of the term and of the inheritance, then united in sir A. Chadwick, so as to prevent the term's being attendant; for if there had been, I conceive, the declaration of the trust to attend could not have made them so. Now, therefore, if there was such an union of the ownership of the term and of the inheritance in sir A. Chadwick as is necessary and proper for the attendancy of the former on the latter, it appears from the above enquiries, that in construction of equity they were attendant, unless sir A. Chadwick declares his intention to the contrary; but so far from declaring any such intention to the contrary, I think we have strong arguments of his intention that they should be attendant. The conveyance of the inheritance and of the terms in the several houses at, or so nearly at, the same times respectively, shews that the acquisition of both was in view at the same time, and as constituting one purchase, and to complete one entire title, to be enjoyed together, and not as distinct species of property. This conclusion is much strengthened by our considering, that these terms were all future interests at the time of his purchasing them, and such as did not give him a present possession as divided from the inheritance. The having these terms granted to different persons from the inheritance manifests an intent to keep them on foot for protecting that inheritance, which protection implies their attendancy on that inheritance, and going in the same channel. And as to the rent and reversion reserved in them by the trustees, it was evidently owing to their being restrained to that mode of making a title by the terms of the powers given them under lady Madox's will, which requires the reservation of rent, and of a reservation of the insertion of the usual covenants. The purchasing these rents afterwards is an argument of his intent to remove, as far as possible, every thing that could separate these terms from the reversion, and consolidating them into one connected title. So far there-

fore as fir A. Chadwick's interest was requisite to make these terms attendant, I think we have very strong presumptive evidences of its existence; but from what I have before observed, I should not think any positive assent on his part requisite to such attendancy; I think it sufficient that he did not express any negative to it. Upon the whole, therefore, I incline to the opinion, that all the terms in question ought, in construction of equity, to be deemed attendant on the inheritance; and as fir A. Chadwick has not expressly mentioned or devised them in his will, or thereby manifested any intent to sever them from the inheritance, or pass them as personal property, but the only words in his will which can be applied to them are generally words expressing a manifest intention to carry the whole estate and inheritance, I conceive, the will not being executed properly to carry such inheritance is not sufficient to pass these terms, which ought to be considered as part of the inheritance; and therefore I cannot help inclining to the opinion, that a rehearing or appeal on the part of fir A. Chadwick's heir might be reasonably looked to with expectation of success.

January 8, 1779.

G.

No. VII.

CASE *on an ESTATE in FREE SIMPLE DEFESIBLE*
ON LEAVING NO ISSUE.

JOHAN DOBIN, of North Petherton, in the County of Somerset, yeoman, by his will of this date (*inter alia*) gave and devised as follows:

"ITEM, I give and devise unto my son Philip Dobin, his heirs and assigns for ever, all that messuage or tenement wherein I now live. But my will is, that in case my said son Philip Dobin shall happen to die *leaving no issue BEHIND HIM*, that then my said wife shall receive and take the rents, issues, and profits thereof, and dispose of the same at her will and pleasure, and shall have, use, and enjoy all my in-door goods as long as she shall continue a widow, and no longer; and after her decease, or marriage, as aforesaid, then the lands so devised to Philip as aforesaid, I give and devise the same, *for want of issue* by him *as aforesaid*, unto my son James Dobin, his heirs and assigns for ever, chargeable, nevertheless, with the payment of 50l. a-piece, to my six daughters, and their issue, within a twelve-month after he shall so enjoy the same. But in case my son James Dobin shall happen to die *before* my son Philip, *and the said Philip shall not leave any issue of his BODY begotten*, then my will is, that my said lands shall be sold and equally divided between my six daughters, Magdalen Lockier, Mary Mills, Sarah Boone, Elizabeth, Rebecca, and Ann Dobin, and their *issue*."

THE testator also gave to his said son Philip, who was his heir at law, all the rest and residue of his estate and effects, and appointed him executor of his will.

July 21, 1726.
A testator devised a messuage unto his son P. his heirs and assigns for ever; but in case the said P. should happen to die, *leaving no issue behind him*, then the said testator, after making some intermediate devises, which never took effect, willed that his estate should be sold, and equally divided between his six daughters and their *issue*.—*OPINIONS* of several eminent Counsel, Whether P. took an estate-tail, or a fee determinable upon his dying without issue living at his decease? and, What issue of the daughters were intitled to a share of the produce of the estate?

PHILIP, on the 12th of November 1726, proved the will in the archdeaconry court of Taunton, and possessed himself of such part of the testator's estate and effects as were given to him by the said will, and paid the several legatees their respective legacies.

JOAN the testator's widow survived him, but died a few years after.

JAMES the son also survived, *but died in the life-time of Philip*, leaving issue as in the pedigree left herewith.

IN Easter Term 1729, *a recovery* was suffered of the premises devised to Philip, wherein the said Philip and Jane his wife were *vouches*.

PHILIP died some time in the year 1780; but a considerable time previous to his death he mortgaged the said premises, and afterwards released the equity of redemption thereof.

MARY MILLS, in her life-time, assigned her interest in remainder to James her son, in preference to Michael and Ann his brother and sister, which it is conceived she had a right to do.

CONSIDERABLE doubts have arisen on this Case, as to the nature of the estate which Philip took under the will; and also as to the ultimate division of the property among the daughters of the testator and their descendants. The opinions of gentlemen of the first eminence (mr. Mansfield and mr. Fearne) have been taken, but they differ very essentially on both points. A mr. Letch's opinion has also been taken; who indeed concurs, so far as his opinion goes, with mr. Fearne.

YOU will be pleased to peruse this Case with attention, and advise on the following *Quæres*:

I. Quære. WHETHER PHILIP took an estate in fee simple *subject to be defeated on his dying without issue* LIVING AT HIS DEATH? or, Whether the said Philip took an estate tail with remainders over? or, Whether such subsequent limitations must not be considered as executory devises, sup-
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posing the first limitation in fee? and, Whether the recovery suffered by Philip and his wife effectually destroyed such after-limitations, so as to prevent the testator's daughters, and their issue, from contesting the title of the mortgagee or purchaser?

PRESUMING that James took no interest in perpetuity 2. *Quære.*
under the will, How far are the daughters of the testator, and their issue, as stated in the pedigree, now entitled under the said will, and in what degrees, shares, and proportions? and, Whether the word *issue* is to be considered as a word of limitation; that is, as intended to give such an interest to the daughters in their respective shares as should be transmissible to their *issue* in the nature of an estate tail, or as a word of purchase entitling the issue by way of remainder after the decease of the parents, or to share with the parents therein? and if the latter, To what issue it extends, whether only to issue born in the testator's life-time, or to issue living at the time of the limitation taking effect, *viz.* the decease of Philip, or to all future issue? *Vide* *Alcock v. Ellen*, 2. Freem. 186. Mr. Fenton is requested to point out *particularly* in the pedigree those who may be entitled to distributive shares of the estate in question.

UPON the whole, Would you advise, from any probable chance of success, the points to be agitated by two of the descendants from daughters *alone*, the others refusing to concur with them therein? and, Whether the question might not be easily determined by bringing an ejectment in the name of Mary Dobin, the testator's great-granddaughter, who appears to be the heir at law of the testator, against the mortgagee in possession? or, What other mode would you recommend to be adopted to put the matter in issue *at the least expence?*

I RATHER incline to think that the devise to Philip OPINION.
may be construed an estate tail, considering the first limitation C.

tation to him his heirs and assigns as qualified and reduced by the limitation over *in default of his leaving issue*. Had the words been "*die without issue*," or "*die without leaving issue*," or "*leaving no issue*," instead of "*leaving no issue behind him*," I should not have hesitated to deliver such an opinion under the authorities of *Soulle v. Gerrard*, Cro. Eliz. 525.—*Tuttenham*, 2. Cro. 22.—*See 2. Vez. 615. Brown v. Jervis, ibid. 290.—Forth v. Chapman, 1. Peere Will. 667.—and Walter v. Drew, Com. Rep. 373.* And the words "*die leaving no issue BEHIND*" do not appear to me to differ so much in import from the words "*leaving no issue*," as to warrant a different construction, so as to make that an *executory devise* by force of the latter of that which would have been a *remainder* after an estate tail under the former. Besides, the devise seems now to rest on the last limitation, that in case his son James should happen to die *in the life-time of Philip*, "*and the said Philip should not leave any issue of his body begotten*;" by which I incline to be of opinion, that Philip's estate may be considered as abridged to an estate tail; and if so, it follows, that by a recovery he could bar that estate and the remainders over, and acquire the fee so as to enable him to mortgage or dispose of the same, but not without a recovery. But if the words "*leave no issue BEHIND him*" should be considered as confined to issue *living at his decease*, then I apprehend the first limitation being to him *in fee*, the limitations over on that event were *executory devises* which he could not bar, and consequently could not enable himself to mortgage or sell the lands.

3. *Quære.*

IF PHILIP had no power, Then to whom does the estate now belong, and what method is advisable to be pursued, and by whom, for the recovery? As Mary Mills transferred her right to her son James, Is he entitled to her share in exclusion of his brother and sister Michael and Ann?

SUPPOSING that Philip did not take an estate tail, then the limitations over were executory devises, first to James in fee, but if he died in Philip's life-time, then that the estate should be sold and divided (that is, the produce thereof) among his six daughters and their issue. Now, as James did die in his brother's life-time, the limitation to him, I apprehend, failed, and that for the benefit of the six daughters and their issue took place. Under which a question arises as to the construction of the word "*issue*;" namely, 1. Whether this word is to be considered as a word of limitation, that is, as intended to give such an interest to the daughters in their respective shares as should be transmissible to their issue in the nature of an estate tail? or, 2. as a word of purchase intitling the issue by way of remainder after the decease of the parents, or to share with their parents therein; and if the latter, to what issue it extends? 3. Whether only to issue born in the testator's life-time (as is frequently the construction in gifts of personal property, of which nature the present seems to be so far as respects the interest of the devisees, the lands being directed to be sold and divided among the said legatees)? or, 4. to issue living at the time of the limitation taking effect, that is, the decease of Philip? or, 5. to all future issue? The third and fifth of these constructions I shall lay out of the case, for two of his daughters being unmarried at the time, he could not by "*issue*" mean "*issue living at the time of his will*;" and the division being directed to be made between the daughters and their issue, of necessity supposes the possibility of the *daughters being living* at the time of the division to be made; which if *all their issue* that might be was to share in the division would be impossible, as the number or existence of such issue could not be ascertained till after the decease of *all the daughters*. Of the other three constructions, the first seems to me the most probable; namely, that of the word *issue* being used as a word of limitation, giving an interest in the nature of

of an estate tail; for the limitation being to issue generally, with nothing to confine it to issue living at the decease of the daughters, I do not see sufficient ground to consider it as a word of purchase intitling the issue after the decease of the daughters: and I think the construction that the issue should share with the parents is also objectionable, as some of the daughters had no issue in the testator's life-time; and he has expressly directed the division among all his six daughters, without confining it to such issue as should be then living, nor substituting the issue in the room of the parents; and has not confined it to issue in the first degree, *viz. children*, but used the general collective word *issue*, extending to all issue in any degree, under which every child of any daughter, and every child of such child living at the time could claim an equal share; so that one daughter and her issue might eventually sweep away three-fourths of the estate from the rest of the daughters. I observe that the legacies of 50*l.* given to the daughters in the event of the estate's going to James and his heirs, is limited in the same manner. This, I think, is an additional argument for the construction I have mentioned; for if we consider the issue then to take as purchasers with their parents, the six daughters and their children and grandchildren might, together, have become entitled to 3000*l.* instead of 300*l.* and their legacies have exceeded twice the value of the estate on which they were charged, so as to have left James not a single farthing from his devise. And this construction is warranted from the Case of *Allcock v. Ellen*, 2. Freeman, 186. Now, under this construction, had the interest of the daughters been in the nature of real property, the heir in tail of every daughter who left issue would have been intitled to the mother's share, or sixth part, and the heir at law of the testator to the shares of the two daughters who died without issue. But the direction that the lands should be sold, I apprehend, should be converted into personal property, as to the gift to the daughters

ters and their issue, so as to intitle such daughters to their respective shares of the money arising from such sale absolutely as, if such daughter's share had been limited to her and her issue (taking *issue* as a word of limitation), which (as money cannot be entailed, and here is nothing to confine it to issue living at her decease), I conceive, would have vested absolutely in her. If so, each daughter's *personal representatives* are now intitled to her share of the value of the estate, except as to Mary Mills's share, which, under the above construction, I conceive she with her husband, or after his decease she alone, had power to assign to her son James in exclusion of his brother and sister; and I apprehend, as the lands themselves are not devised, but only directed to be sold, the remedy of the claimants under the daughters (supposing them intitled) must be in *equity* by a bill against the vendee, of Philip, making the heir at law of the testator, *viz.* James Dobin, the grandson of the testator, the personal representatives and the issue of all the daughters, parties, praying to have the lands sold, and the monies paid to the claimants according to their respective rights. After all, I am aware this Case is so open to different Opinions, that I think it cannot be satisfactorily decided but by the decision of a court of equity.

May 15, 1783.

C.

I AM of opinion, that Philip took an estate in fee liable to be defeated in the event of his dying without leaving issue living at his death; and in that event the premises were given to the wife during her widowhood; and after the expiration of that estate to James in fee, if living at the death of Philip, but liable to be defeated in the event of James's dying before Philip; and on that event the premises were to be sold, and the money equally to be divided

OPINION.

1.

vided among the daughters and their issue. The consequence of this is, that Philip having died without leaving issue at his death, no sale or mortgage by him can be of any effect. James and his issue and heirs have no interest in the estate, because the devise to him was defeated by his dying during the life of Philip. The whole therefore belongs to the daughters and their issue; and though it is not easy to say with certainty what was meant by the word *issue* in the will, or is now to be understood by it, I am inclined to think, that the money which will be produced by the sale of the premises, is to be divided equally amongst the six daughters and the children of each daughter *per capita*, every child of a daughter having an equal share with a daughter; and as some of the daughters are dead, and one child, *i. e.* John the son of Magdalen, is dead, the personal representative of every daughter that is dead, and the personal representative of John, are intitled to the share which such daughters and John would have been intitled to. The grand-children and great-grand-children are not, I think, intitled to any thing. The method to be pursued to obtain a sale and division of the money is, I think, by a bill in equity by all the parties intitled to share against the heir at law, and any purchaser or mortgagee claiming under Philip.

Temple, December 13, 1783.

L.

OPINION.
K.

I HAVE attentively considered this Case, and think, that no certain opinion can be formed upon it, there being no decision exactly in point with the principal question in it, *viz.* What estate Philip Dobin took in the premises? I am, however, upon the whole inclined to be of opinion, that the devise to Philip was a fee-simple, with executory devises over on the event of his dying without issue living at the time of his death. The consequence in this case

case would be, that the subsequent devises would not be affected by the recovery by Philip and his wife. The two Cases in the books that seem most nearly to resemble the present are those of *Pells v. Brown*, Cro. Jac. 590. and *Forth v. Chapman*, 1. P. W. 663. The latter Case was, in effect, a devise of both freehold and leasehold to *A.* and if he dies without leaving issue, remainder to *B.* It was held in that Case, that the devise should have two different constructions according to the different natures of the property devised. In respect to the freehold, it should, for the benefit of the issue, be construed a dying without leaving issue generally, that they might take it on the death of their father; but in respect to the leasehold, as the issue could not possibly take it under that devise, as being incapable of being intailed, the words were restrained to a failure of issue at the death of the first taker, in order to give effect to the devise over. This determination, so far as it goes, makes against the Opinion I have set out with giving; but I do not think it will govern the present Case, there being several material circumstances in which they differ, and which may probably induce a court to give the words "*without leaving issue*," that meaning which lord Hardwicke has on several occasions (all it is true relating to personal property) declared to be their most natural meaning, *viz.* leaving issue at the time of the death; for the devise in this case gives in the first place a fee to Philip, which would enable him to give the estate, or permit it to descend to his issue, if he left any at his death. But in the Case of *Forth and Chapman* the devisee took only an estate for life, unless the words "dying without issue" were construed to enlarge the intent, and give an estate tail; so that with this construction the issue could never have been benefited by the devise. I do not lay much stress in this case on the words *behind him* after the words *leaving no issue*, as they may be construed to extend to an indefinite failure of issue as well as the other words

words "leaving no issue;" though I think they rather strengthen the former words, as their natural meaning is also relative to the time of the decease. But in the present liberal disposition of courts of justice, the best reason for expecting the devises over to be construed executory devises, is, I think, that it best serves the intention of the testator; for if the devise to Philip is held to be an estate tail, Philip might (and he in fact did) gain the absolute dominion over the estate, and by that means had it in his power to defeat, not only the devises over but the interests of his children. But on the other construction, the devises over being executory would not be at all in his power, and would therefore at all events be safe; and though the interests of his children would be in his power, yet as he could make no disposition of the estate in his life but what would cease if he left no issue living at the time of his decease, his power of disposing would be, in fact, more fettered and difficult, and consequently the temptation to defeat his children less than if he was tenant in tail, when by suffering a recovery he would have a full and absolute power of disposition. And as I think the inclination of the court would lead to this construction, so I think the Case of *Pells v. Brown* would justify it. That was a devise by a testator to his second son and his heirs for ever, and if he died without issue living, William his brother, then to William in fee; and this was adjudged to be a good executory devise to William. So in the present Case, the devise being to Philip and his heirs for ever; and if he dies leaving no issue behind him, then to the testator's wife during her widowhood, the devise to her must take effect, if at all, on *Philip's dying without issue, she being then a widow*; which seems to bring it very near both the words and the reason of *Pells v. Brown*.

I CANNOT help considering the words *and the said Philip shall not leave any issue of his body begotten*, in the clause

clause introducing the direction to sell, as a repetition, but not so fully expressed, of the first contingency of Philip's dying leaving no issue behind him, and consequently as bearing the same construction; it seeming natural, when the meaning is once fully expressed, not to be so attentive to accuracy in repeating it. Besides, as the devise to sell is subsequent to the devise to the widow, and to take place after her death, as well as that of James, if the devise to her was an executory devise, it seems to me that the devise to sell must also be considered as executory to make the will consistent. It appears to me that all the different devises were intended to take effect in succession; and if the devise to the widow would have been an executory one if the event had happened on which she was to take, Philip could not have an estate tail at the death of the testator when she was living; and I do not see how her death afterwards could possibly change his interest into an estate tail.

I do not see any objection to the questions in this Case, so far as they respect the persons claiming under Philip, being tried in an ejectment to be brought by the heir at law of John Dobin the testator; for if the estate ought now to be sold for the benefit of the persons claiming under the testator's daughters, the legal estate must, I conceive, be in such heir at law. But this will not decide the question between the daughters themselves and their representatives.

As to that question, I think it must be considered as a bequest of personal property to them, but the manner in which it is to be divided between the daughters and their issue is, I think, very doubtful. According to Mr. Fearne's construction, such daughters became absolutely intitled to the whole interest in one sixth part of the money to arise by the sale, by which the issue would not take any interest whatever under the will. The Case from Freeman cer-

tainly proves what it was cited for, *viz.* that a bequest to children and their issue may operate as or in the nature of words of limitation, *i. e.* give them the absolute interest in the thing bequeathed. But there seems to me a difference between that Case and this, which I should think is material, *viz.* in that there was no intermediate bequest, but the division was to be made at the testator's decease; but here the division was not to take effect till the happening of a future event; and the construction of the will must, according to all the cases and the reason of the thing, be made as relating to that time. Now it appears to me, that the word *issue* in this Case was used by the testator for the purpose of substituting the children in the place of their parents, if they died before the division; and as the word *issue* is, in cases of personal property, either a word of purchase or of limitation, as the intention of the testator requires, it seems to me that it will best effectuate that intent in this Case to give it the former construction; and I am not aware of any decision that will tie up the courts on this occasion from giving it any meaning which they may judge the most proper for this purpose; and I should think that would be to make the children stand in the place of their parents, and consequently to take *per stirpes*. I am therefore of opinion, that the issue of each of the daughters are intitled to the shares of their parents, and consequently that the assignment by Mary Mills did not pass any interest to her son James.

Temple, 20th Jan. 1785.

K,

OPINION.
L.

I AM rather inclined to think upon this Case, that Philip did take an estate in *fee simple*, because if the devise to him were construed to be an estate tail, the word *assign* must be altogether rejected in the limitation for repugnancy.

nancy; and therein this Case differs from many of those wherein a general limitation to the heirs has been restrained to mean an estate tail when followed by the condition of the devisees dying without issue and a devise over. But though I am of opinion that Philip did take an estate in fee, yet I am inclined to think, upon the most mature consideration, that the limitation over of the sale of the estate, &c. is not good as an executory devise, for that the expressions of Philip's happening to leave no issue behind him must be understood of a general failure of issue in this Case, and not confined to a failure at the time of his decease. It is true, that these words have been interpreted so to mean in certain Cases; but they are leaseholds or chattels, as in *Forth and Chapman*, 1. P. W. 663.; and there it is expressly stated, that in a devise of freehold, even in the same will, they should receive a different construction as applied to the one and to the other species; and accordingly in the Case of *Walter v. Drew*, in Com. 373. words very nearly similar to the present were determined not to be restrained to a dying without issue at the time of the devisee's death. Indeed, in some cases, when the executory limitations over have been such as from their nature, or from certain expressions to be collected from the will, shewed an intention in the testator to mean a dying without issue at the time of the decease of the devisee, or the like, the court has laid hold of those expressions so as to confine it in order to effectuate the devise; but in this will I cannot see any circumstances of that kind, and the distribution of the purchase-money to the daughters and their issue has manifestly a contrary tendency. These are therefore my sentiments; at the same time I confess there may be a doubt raised of no small magnitude; and that is, that if by reason of the word *assigns* it becomes necessary to construe the first devise to be a fee simple, all the reasoning upon which the distinction between the application of

the words *leaving no issue*, &c. to freehold and to personalty is founded, would apply to construe this as in the case of a chattel to mean a failure of issue at the decease of Philip, that is, because the prior estate cannot be an estate tail, nor the posterior one a contingent remainder; yet this does not appear to me conclusive enough to pronounce this good as an executory devise.

If the parties are, however, disposed to try the question at law, I think it might be done by an ejectment, making the heir at law of testator plaintiff (for he is in equity a trustee for the sale, admitting the disposition to be good): however, if there be any doubt of proving the pedigree, there might be another demise in the name of Ann, the daughter of James, great-grandfather of testator; and if a fine hath been levied, it is necessary that an actual entry should be made and proved in order to avoid the fine.

SOME question might arise (admitting the devise over to be good), Whether the premises ought to be considered as personal estate under the authority of *Doughty v. Bull*, 2. P. W. 320. and therefore distributable among the personal representatives or next of kin of the six daughters? and therefore the six children of William Lochier are, I conceive, intitled to the share of their father, or more properly their grandmother Magdalen, that is, her sixth among them; so in like manner among the descendants of Mary Mills, Elizabeth Porter, and Ann Irwitt; but as to the shares of Rebecca and Sarah, I conceive the grandchildren of Magdalen Lochier are also intitled to the father's share, together with their other nephews and nieces, including the children of Hugh and James respectively: but I conceive there is no foundation in this Case for distinguishing between the issue of the daughters born in the life-time of the testator, or living at the decease of Philip, or not; for if it be considered as personal estate, the limitation

imitation to the issue as such is void. But this is only a secondary question, being of opinion as I am against the legality of the devise over upon the former ground.*

Clifton, May 23, 1786:

L.

* On a Case sent out of Chancery for the Opinion of the Judges of the Court of King's Bench, it was held, that PHILIP DOWN took in fee simple defeasible on the event of his leaving no issue living at the time of his death;

No. VIII.

CASE *on the GRANT of a PERPETUAL POST OBIT ANNUITY; with the OPINION of an EMINENT LAWYER.*

C. having contracted to grant a perpetual annuity after the death of his father, charged upon the whole family estate, and secured by extensive powers, for an inadequate consideration—
OPINION, That the same was improper, and that *C.* in equity would be only debtor for the money advanced and interest.

THE honourable *mr. C.* having agreed with *F. W.* esq. for the consideration of 4,300*l.* to grant him a perpetual annuity or rent-charge of 300*l.* issuing out of a sufficient part of the estate, lands, and tenements which *mr. C.* is now in possession of, or shall be entitled to, at the death of his father the lord viscount *C.* in case *mr. C.* should survive his father, the first half-yearly payment to become due at the Lady-Day, or Michaelmas, which should next happen after the death of lord *C.* but if *mr. C.* should first die, then the grant of the annuity to be void; *mr. W.* has agreed with *mr. B.* one of his partners, to advance 1,900*l.* part of the said sum of 4,300*l.* on the terms in the deed of the grant of the said annuity mentioned and recited, and the sum of 4,300*l.* has been actually advanced to *mr. C.* upon his engagement to secure the said perpetual annuity of 300*l.* as before mentioned.

THE deeds being engrossed, and *mr. C.* required and expected to execute them last Friday morning, he is desirous of having *mr. ———*'s opinion; *Whether the covenants are proper and reasonable?* and, *Whether he will not be tied up and put to more inconvenience through the deeds than seems necessary for the grantee's security?* and, particularly, *Whether the power of entry should be without impeachment of waste?* and, *Whether in the covenant for further assurance it is proper and necessary for him to covenant to levy and suffer the fines and recoveries particularly mentioned therein at his own expence, he never having made any particular agreement so to do?* and,
 Whether

Whether it is not unreasonable and unnecessary, and may not hereafter be very prejudicial to mr. C. to charge *the whole estate* with the payment of the said annuity?

NOTE, There is a defeasance from mr. W. to mr. C. intended to bear date the day after the date of the indenture *tripartite* now laid before you, whereby, after reciting as in that indenture is recited; and also after reciting the indenture itself, it is witnessed and declared, that the said annuity was granted only on condition of the said mr. C.'s surviving lord C. and not otherwise; and that the first half-yearly payment should not be payable but as before stated, &c. &c. &c.

THIS transaction is much marked with the ruin of mr. C. and the oppression of the gentlemen he deals with. OPINION,
M.

THE general tendency of it is to anticipate his expectations as heir of a considerable family; and, for the purposes of dissipation, to encumber and mutilate his paternal succession and fortune: I say *for the purposes of dissipation*, because 2,400l. out of 4,300l. is merely of that kind, and the other 1,900l. is to substitute in the place of such another contract, and is made to charge his paternal inheritance for ever, instead of the present charge, which is for lives.

THIS practice is contrary to the first principle of the policy of all governments, by circulating quick ruin amongst the eminent families, and makes above one great head of objection to the validity of the contract before me.

THIS practice is not only exceptionable in a general consideration, as opening the door to rank oppression on one hand, and frequent ruin of considerable families on the other (which last article has a certain and immediate tendency to corrupt the principles of any constitution where it happens), but it is broadly marked with these two qualities in the Case now before me:

FIRST, An annuity in fee is granted for somewhat less
U than

than two-thirds of its real value, following the accounts even of those who transact for the purchaser.

SECONDLY, An annuity of 300*l.* is made a charge on the whole *C.* estate, which I suppose is equal to twenty such annuities; and looks more like a large and general tret than a particular charge.

THIRDLY, The estate is recited to be under very strict and special family settlements; and there are covenants, for the sake of this single annuity, to destroy all those settlements, and convey all those estates to the annuitant himself at a most enormous expence, which is likewise to be put in the scale against *mr. C.*

FOURTHLY, The conveyance of this great estate to the annuitant himself upon an everlasting trust for his own benefit, with a license to enter unimpeachably of waste, to be done by means of fines and recoveries, makes the manner of this transaction so monstrously disproportioned to the end, that it is fit for nothing but to be ashamed of.

IN my opinion, therefore, the contract is foul, fraudulent, and void; and the bond already given by *mr. C.* is liable to be set aside in equity, as to all but the principal sum advanced and interest upon that.

AND, according to my thoughts, this line of justice may well obtain, without any kind of impeachment to the general right of English subjects to dispose of their property as they please.

ON the contrary, it proceeds upon the self-same principle with that right. If it be an advantage to the owner of property to make it easily transferrable, it is a further improvement upon that advantage to guard the act of transferring from fraud and oppression. And this is one of those exceptions to a general rule, which prove the rule, by further establishing and illustrating the principle on which such rule is built.

MY opinion being, that, in equity, *mr. C.* is only a debtor for the money really advanced and interest upon that,

I will

I will not employ myself in suggesting any other form of contract by which he may seem to bind himself to more.

July 28, 1764.

M.

N. B. IN Gwynne and Heaton, Trin. 1778. 1. Bro. Ch. Rep. 1. (almost exactly this Case) lord Thurlow, Chancellor, decreed the grant of the rent-charge only to stand as a security for the money really paid; the grantor to pay costs as on redeeming a mortgage.

No IX.

The OPTION: or, an ENQUIRY into the GROUNDS of the CLAIM made by the ARCHBISHOP on all CONSECRATED or TRANSLATED BISHOPS, of the DISPOSAL of any PREFERMENT belonging to their respective SEES that he shall make CHOICE of.*

THE word Option, as applied to this Case, is a term unknown to our law, either civil or ecclesiastical; nor is the term so applied to be found in the archbishop's Registers either old or new. But it has prevailed in common language from the time the archbishops have taken upon them to choose out of all the preferments belonging to the see of a new bishop, what particular benefice they would have, for the first avoidance, as a fee due to them of antient right.

As no archbishop in the Christian church ever claimed this right, excepting the archbishop of Canterbury, and, in imitation of him, the archbishop of York; it is very probable that this claim arose from some right pretended to by the archbishop of Canterbury in virtue of the legatine

* This Tract was written by Dr. Sherlock, bishop of London, in opposition to the right claimed by the archbishop of Canterbury, of nominating the next turn to any preferment he chose on the bishop's removal to the see of London. Dr. Herring, the archbishop, on that occasion had demanded the living of St. George's, Hanover-square, which was resisted by bishop Sherlock, who, however, afterwards compromised the difference by giving up the living of St. Ann's, Soho. On this dispute Dr. Sherlock printed fifty copies of this Tract, of which he distributed forty amongst the judges, civilians, &c.; and being now to be met with in very few hands, is here preserved for the purpose of more extensive information.

power from Rome annexed to that see. That many such rights had this foundation, and no other, may be seen from the text of the canon law itself; where, speaking to the bishops of England of the archbishop of Canterbury's power, the words of the canon are, "*Sane licet idem archiepiscopus metropolitico jure audire non debeat causas de episcopatibus vestris nisi per appellationem deferantur ad eum*, Legationis tamen obtentu universas quæ per appellationem vel querimoniam perveniunt ad suam audientiam, audire potest & debet, sicut qui in provinciâ suâ vices nostras gerere comprobatur." So that this, and some other like powers, belonged not to the see of Canterbury but to the archbishops, merely as the pope's delegates.

BUT, That the archbishop had by antient usage a custom, whatever the original of it was, to claim a preferment from the new bishop for a clerk of his own, shall be admitted.

THE question then is, What this antient right was? And this can only be learned by the practice; and what that was, appears in the Registers of Canterbury.

IN the Register of archbishop Winchelsey, who came to the see in 1294, are the following entries:—"Item eodem anno (1308) contulit gratiam Domini Walteri Reginaldi Episcopi Wigorn. quam tenetur facere RATIONE CONSECRATIONIS SUÆ, Domino G. de Bruton *"

WINCHELSEY
1294.

THE like *gratia* from the bishop of Exeter (who was consecrated 12th October 1309), upon account of his consecration, is entered in the same words. The bishop was Walter de Stapleton. It is evident from these entries, that what is now called an *Option* was then called the *gratia*, or free gift of the new bishop to the archbishop or his clerk, *ratione consecrationis suæ*, as a kind of present to

* N. B. G. DE BRUTON was the clerk named by the archbishop to be preferred by the bishop of Worcester.

the archbishop on account of his trouble in the consecration. Now what was given and accepted *ex gratia*, was not demandable *ex debito*. But those free gifts came at last to be considered as the archbishop's right; in the same manner that equal provisions were introduced; which began under the notion of favours granted to the Pope.—
 “ *Non enim imperiosis istis diplomatis terrebant statim episcopos, et ad sibi parendum cogebant, sed ut leviter primum tentarent eorum patientiam, literis monere eos ac rogare solebant, sed cum preces & monita gravatè ab episcopis reciperentur, ac plerumque ea contemnerent, mox in præcepta conversa sunt.*” Duarenus de Beneficiis, L. 5. C. 8.—
 These sort of prayers are properly enough stiled by the lawyers *preces armatæ*:

WHAT is to be understood by *gratia* in the Register, may be best explained from the archbishop's Registers themselves. Among the titles for orders, we frequently find chaplains of noblemen ordained with no other title than the promise of the nobleman to provide for them; and in this case the entry is, that such a one was ordained *ad gratiam domini sui*. The archbishop's own chaplains are sometimes ordained *ad gratiam domini*, without other title, in all which cases the reliance is upon the free favour of the patron.

THERE is another instance of what is now called an Option in the same Register (Winchelsey's), as appears by a letter of the archbishop to the bishop of *Ely*, in which he states his right of nominating his clerk to him, *ratione CONSECRATIONIS suæ*. The archbishop accordingly nominates the then dean of the arches to be promoted to a benefice suitable to his merit, *quam cito se facultas obtulerit*; and till then to be allowed a pension, *honori vestro & personæ ipsius congrua*.

LIKE instances appear in the Registers of other dioceses. The following are taken from an old Register of the bishop of Bath and Wells:

Ex

Ex Registro JOHANNIS DE DROKENESFORD*.

MEMORAND. quod sub datis London 6 Idus Novembris anno domini MCCC decimo dominus episcopus concessit domino Petro de Eiston clerico domini Cantuariensis archiepiscopi, canticaplacione ejusdem patris, quinque marcas annuæ pensionis in festis Pasch. & Sancti Michaelis annis singulis de camera episcopi percipiendas, donec sibi per dominum episcopum provisum fuerit de beneficio compænti.

Ex Registro RODOLPHI DE SALOPIA.

SYMON permissione divina Cantuariensis archiepiscopus, totius Angliæ primas, venerabili fratri nostro Radolpho, Dei gratia Bathoniensi & Wellensi episcopo, salutem, & fraternam in domino caritatem. * Cum, de consuetudine laudabili nostrorum predecessorum, tempore hætenus sit obtentum, ac etiam a tempore, & per tempus cujus contrarii memoria non existit, laudabiliter usitatum, quod quiscumque in episcopum cujuscumque cathedralis ecclesiæ, nostræ Cantuariensis ecclesiæ electus, qui per archiepiscopum Cantuariensem in dicta ecclesia episcopus fuerit CONSECRATUS, personæ idoneæ, quam idem archiepiscopus in hac parte duxerit nominandam, in sua cathedrali ecclesia, si inibi canonicatus & prebendæ existant, de canonicatu & præbenda, alioquin de alio beneficio compænti providere ac etiam eidem nominato, quousque sibi, sic ut præmittitur provisum fuerit, unam pensionem constituere teneatur. Nos vero jura & consuetudines nostræ ecclesiæ Cantuariensis observare, quatenus nobis est possibile, cupientes, ac promotionem dilecti clerici nostri magistri Laurentis de Falsstolf suis exigentibus meritis corditer affectantes, ipsum, juxta consuetudinem prælibatam, vobis, quem nuper in Bathon & Wellen ecclesiarum episcopum CONSECRAVIMUS, ad canonicatum &

MEPHAM,
1328.

* He was consecrated August 1309.

† ROBERT WINCHELSEY, who came to the see 1294, and died 1313.

prebendam in dicta vestra ecclesia, necnon ad hujusmodi pensionem, quousque de canonicatu & prebenda in præfata ecclesia sibi per vos fuerit provisum, sic ut præmittitur, obtinendam, duximus nominandum, vosque ad nominationem nostram hujusmodi prædictum magistrum Laurentem, in canonicum & fratrem dictæ vestræ ecclesiæ recipietis, quo circa fraternitatem vestram requirimus & rogamus, quatenus eidem magistro Laurenti prebendam in ecclesia vestra prædicta, cum prius id commodè fieri poterit, conferre & assignare curetis, ac quousque sibi, sic ut præmittitur, provisum fuerit, eidem talem pensionem constituere, quæ dantem deceat, recipientemque vobis reddere debeat fortius obligatum, literas vestras patentes sigillo vestro signatas sibi super hoc fieri facientes, et quid in præmissis duxeritis faciendum, nobis per magistrum Thomam de Stowe clericum nostrum quem hac occasione vobis duximus destinandum curetis rescribere sine mora. Dat. apud Maghefeld V. Idus Septemb. anno domini MCCC vicesimo nono et consecrationis nostræ secundo.

R. DE SALOTIA
Consecrated Sep-
tember 1319.

Radolphus permissione divina Bathoniensis & Wellensis episcopus dilecto sibi in Christo magistro Laurenti Falstolf, salutem, gratiam et benedictionem. Precibus reverendi patris nostri, ac domini, domini Symonis, Dei gratia Cantuariensis archiepiscopi, totius Angliæ primatis, pro te sumus favorabiliter inclinati, attendentesque quod nostris ecclesiis prædictis fructuosus esse poteris in futurum, volentesque te ob hoc munus respicere, gratiori, quinque marcas sterlingorum annuæ pensionis de camera nostra, singulis annis ad festum Sancti Andreae & natiuitatis Beati Johannis Baptiste, æquis portionibus percipiendas, quousque de beneficio ecclesiastico competentis tibi fuerit provisum, tibi conferimus pro præsentis. In cujus rei testimonium sigillum nostrum præsentibus est appositum. Dat. apud Dogmersfeld Sext. Kalend. Octobris anno Domini, &c. et consecrationis nostræ primo.

1. FROM these instances it may be observed, in the first place, that the archbishop's claim was founded upon Consecration only.

2. THAT

2. THAT the archbishop had no choice, or *Option*, but only the naming to the new bishop the person to be preferred.

3. THE new bishop was to be judge of the competency of the benefice and of the pension. This was at first plainly the state of the case.

IN the Register of archbishop Reynolds, immediate successor of Winchelsey, a monition is entered to the bishop of St. Asaph to admit the clerk whom the archbishop had named. In this monition the archbishop asserts his right of naming and recommending a clerk, *cui libet electo * post confirmationem*, to be promoted to a canonry and prebend of his church, *si ecclesia fuerit prebendalis; alioqui*, to some other benefice. Which person the said ** electus confirmatus* is to receive and admit, and to promote *quam cito se facultas obtulerit*; and in the mean time to allow him a competent pension.

REYNOLDS came to the see of Canterbury, anno 1313.

BUT (as the monition goes on) though the said bishop had at his CONSECRATION made his profession, and taken an oath to maintain the rights of the see of Canterbury, yet that *professionis suae et juramenti non memor*, he had refused to receive the archbishop's clerk,

So that a bishop *electus confirmatus* was always a new bishop, and to be consecrated.

THE official of London (to whom this monition is directed) is therefore to require the bishop to receive and admit the archbishop's clerk within eight days, otherwise the bishop to be suspended *ab ingressu ecclesiae*.

1. HERE the right of nominating a person is claimed *post confirmationem*, but not *ratione confirmationis*. And the bishop of St. Asaph was a *consecrated* and not a *translated* bishop; and the archbishop, in this instrument, lays the stress rightly upon his profession at his *consecration*. And though, as the law is now understood, a bishop can-

* *Electus* is to be understood of a bishop who was to have consecration. For in the case of a translated bishop the stile is *postulatus*, and not *electus*; nor had any translated bishop *confirmationem*, nor could he have it in times of Popery, from the archbishop. *Vide Appendix.*

not

not confer the benefices of his see till he has had restitution of the temporalities, yet there are many instances where the temporalities have been restored after confirmation, and before consecration; and, in antient times, it was the general rule of the canon law that a bishop, after his confirmation, could dispose of the preferments of his see. *Decret. de Elec. & Electi Potest. c. 9.* and so *Duarenus*, p. 77. “*Notandum est simulatque quis electus esset & confirmatus; jus beneficiorum conferendorum ei competere, licet nondum consecratus sit.*” This being the law at that time, I suppose it will be easily understood why the archbishop insisted upon a promise *statim post confirmationem*, though the grant itself was ever *ratione consecrationis*.

FOR bishops, after confirmation, had a power of doing all that the archbishop insisted upon, which was a promise to provide for his clerk, *quam cito se facultas obtulerit*. And as this came to be considered as a fee due to the archbishop for the consecration of a bishop, it is not to be wondered at that it should be demanded after confirmation was given. And even to this day it is claimed to be due *statim post confirmationem**, though it is well known that no consecrated bishop can grant any of his preferments after confirmation, till he has had restitution of the temporalities, which is not now done till after consecration.

2. THE archbishop does not demand any particular benefice, but he requires that his clerk be admitted to a prebend; but to no particular prebend by name. He requires a pension in the mean time, but does not take upon him to name the value.

WARHAM came to the see of Canterbury in 1503.

IN Warham's Register there appears a grant to the archbishop by the bishop of St. Asaph (a consecrated bishop). In the preamble to this grant the custom is recited, “*Cum archiepiscopus Cantuariensis jure & consuetudine, &c.*”

* This was right in archbishop REYNOLD's time, when confirmation by the archbishop was always followed by consecration. But continuing that language now is a blunder of the actuary. *Vide Appendix.*

“*cui libet.*”

“ cuiuslibet electo in episcopum post confirmationem personam idoneam nominare possit, quem electus confirmatus tenetur providere de canonicatu et prebendâ in ecclesiâ suâ cathedrali, si fuerit prebendalis; alioqui, de aliis competente beneficiâ; and in the mean time to accept and admit, and to allow him a competent pension.” After this recital, the bishop grants to the archbishop *“ primam & proximam advocacionem primæ et proximæ prebendæ, seu alterius beneficii, to present a fit person for one turn only.”*

1. THIS is the first grant of a benefice to the archbishop by deed. And it is also the first instance where the archbishop takes the benefice to his own disposal, without naming a person for it to the bishop.

2. BUT no particular benefice is granted, but the archbishop is to have the first prebend that fell.

THE reason of this change appears, probably, to have been this: so long as the provision for archbishops' clerks was left to the bishop; there must necessarily arise disputes about the value of the preferment to be given; the archbishop's clerk expecting to be promoted to the best, and the bishop being willing, perhaps, to bestow on him only a moderate one. To avoid this difficulty, it seems to have been agreed on both sides, that the archbishop's clerk should take his chance in the first that fell.

THUS the case stood when Cranmer came to the archbishoprick; and what his judgment then was of the right in question, appears from an entry made in his own Register of the fees due to the archbishop and his officers for the confirmation and consecration of a bishop. In this table of fees, those for confirmation and consecration are distinguished under their respective heads. Those for *confirmation* are first set down: to the archbishop, chancellor, and principal register, in distinct articles. Then follow those for *CONSECRATION*: to the archbishop, bishops assisting, chancellor, and principal register. Under *this* head is the following article: *“ Item, at the consecration*

"of every bishop (by prerogative) the disposition of the
 "first prebend that becometh void, after consecration of the
 "elected, by advowson to be granted to the archbishop."
 Then follows the fees to the church of Canterbury.

1. THERE can be no doubt but the utmost of the archbishop's claim, and the greatest extent to which it had ever been carried, is here set forth; when the time and occasion of this very particular entry of the fees are considered.

2. THE claim is expressly limited to consecration, and therefore cannot be extended to translated bishops.

3. THERE is no pretence for the archbishop's right of chusing a particular benefice, it being as expressly confined to the *first prebend that becometh void after the consecration*.

4. IT is observable, that the archbishop here claims the first prebend, *to be granted by advowson*. A proof this, that he took into his claim whatever there was a colour for claiming. There being but * one instance or † two at most, of any such grant before his time.

THE ancient custom undoubtedly was, for the archbishop only to name a person to the bishop to be provided for by him *competenter*, according to his own (the bishop's) judgment.

POOLE, 1555.

WHEN Poole came to the see of Canterbury, he laid his custom in the ancient way, viz. that the archbishop should name and present a clerk to every bishop "statim post confirmationem, cui idem electus confirmatus tenebitur, quam-
 "primum se facultas obtulerit, in sua ecclesia cathedrali (si
 "secularis fuerit) de canonicatu & prebenda; si vero regu-
 "laris, de alio competenti beneficio ecclesiastico providere;
 "and in the mean time to accept and admit the said clerk;
 "and to allow him a pension of 5*l.* per annum;" the first time of naming the value of the pension.

* WARRAM, folio 16. B. 4.

† MORTON, 75. a first advowson is granted to the archbishop, but whether an Option—*Quæro*.

THAT

. THAT the words *statim post confirmationem* had no such meaning as to bring translated bishops under this custom, appears from what follows in the same deed, where the *foundation* of the grant is expressly mentioned; the grant being made *archiepiscopo consecratori meo*. This grant was made by Thomas Watson, bishop of Lincoln.

THE like was made by John Christopherfon, bishop of Chichester; and a prebend in his church becoming void soon, the archbishop presents a clerk to the bishop to be instituted, reciting his title to the patronage *hac vice* to be, that the bishop had "*juxta antiquam laudabilem & legitim. præscriptam consuetudinem hætenus inconcussè usitat. & observat. ac singularem prærogativam ecclesiæ nostræ metropol. Christi Cant. intuitu consecrationis vestræ nobis impensæ*," given and granted to him, the archbishop, the "advowson of the first prebend that became void."

It is plain from these instances that *consecration* was the ground of the archbishop's claim, and that the thing claimed was the first prebend that should become vacant where the church was *secularis*, or some other benefice where it was *regularis*.

PARKER succeeded Poole, and understood antiquities and the rights of his see as well as any that went before him or came after him. In his antiquities he has a chapter under the title *Cantuar. Sedis Privilegia & Prærogativæ*, in which he takes notice of this claim in the following words: "*Provinciales sui suffraganei et episcopi tenentur singuli aliquem ab archiepiscopo Cantuariensi nominatum in bonarum litterarum studiis alere & exhibere, donec eidem de competenti beneficio sit provisum. Sed nec in vita solum & consecrationis suæ tempore hujusmodi officia archiepiscopo suo tribuunt, sed mortui annulos, &c.*"

HERE the right is said to take place *tempore consecrationis*, and therefore where no consecration is, no such right can be claimed. And had the right at that time been understood to arise from the confirmation of trans-

lated bishops, as well as from the consecration of new bishops, it cannot be supposed that so material a right would have been omitted by Parker.

THE practice in his time, as far as it appears to me, seems conformable to the right, as it is here stated by himself; the grants being made *archiepiscopo consecratori meo*. And the instances of grants which I have by me, taken from his Register, being seven in number, appear to be all made by consecrated bishops. But I cannot take upon me to say that there are no instances to the contrary, the search I have been able to make not having been perfect enough to enable me to speak so positively.

THUS stood the antient custom, as it is established by the Registers. The Popish archbishops kept to it pretty closely; but the Protestant archbishops soon departed from it in many respects. And we will now consider what variations were introduced by them, at what time, and on what authority.

CRANMER,
1533.

CRANMER for the first nine years followed the custom as he himself had laid it down, nothing in his Register appearing to the contrary.

BUT there is great reason to suspect, that in the year 1541 an attempt was made to enlarge this right, in the Case of William Knyght, bishop of Bath and Wells, who was consecrated that year.

IN Oughton's Formulary there is a copy of a grant from this bishop to the archbishop upon his consecration: in the recital of the custom in this grant, the archbishop's right is expressly extended to the Case of *translated bishops*. The words in the grant, by which it was attempted, are as follows: "*Quod reverendissimus in Christo pater Cantuariensis archiepiscopus, pro tempore existens, cuilibet suffraganeorum suorum, in episcopum alicujus ecclesiæ cathedralis Cantuariensis provincie, regia autoritate nominato & consecrato, vel ab una ecclesia cathedrali ad aliam ecclesiam regie majestatis nominatione & autoritate translato, statim vel ex intervallo post consecrationem*
"*hujus-*

"*huiusmodi, quemcumque virum literatum habilem & honestum præsentare & nominare valeat, &c.*" • Whoever attends to this clause will see how unskilfully *translated* bishops are drawn in; for whoever drew it had not judgment enough to make this new insertion tally with the old form.

ANTIENTLY this fee was due upon consecration, and the words *statim vel ex intervallo post consecrationem* probably stood in the copies from whence this was formed; but when the transcriber had inserted the words that subjected *translated* bishops to the custom, he betrayed himself by leaving the words *statim post consecrationem* standing, which could not possibly belong to *translated* bishops.

WHENCE Oughton had this deed, I know not. He says he transcribed it *ex autographo*; and probably it came into his hands amongst other papers that he collected for his work. But certain it is, that it never was executed by the bishop, for this bishop's grant to the archbishop is at length in Cranmer's Register. As the bishop might, and I suppose did, reject this deed, though tendered him on account of this and other demands not warranted by custom, this matter probably was contested and the old form restored, and the archbishop contented himself with a grant of the first prebend that fell. The antient claim in this deed is rightly said to be from every bishop electo *confirmato et consecrato*. And this antient language is in every part of it applicable to a new bishop only, and not to a *translated* bishop; though probably the unskilful scribe meant to insinuate, that election and confirmation were a ground for this claim, as well as consecration. Be that as it will, the new bishop might very safely submit to this form, for *consecrato* being added as a necessary circumstance prevented the claim being carried further than what the antient right was. And the archbishop, or rather his officers were soon sensible this was the case, and that they gained nothing; therefore they very soon corrected their mistake; for in the bishop of St. David's Case, though

he was a new bishop, and to be consecrated, and there was no reason, with respect to him, to enlarge the archbishop's claim upon translated bishops, yet for the sake of making a precedent, which others might the more easily follow, in reciting the archbishop's right in the preamble to his deed, these words are inserted, "that every bishop shall after consecration, or, * *post postulationem aut nominationem suam ad aliquam ecclesiam cathedralem infra Cantuariensem provinciam, ad quam ipsum episcopum prius consecratum ex regia nominatione transferri contigerit,* grant to the archbishop," &c. And for security the same is again repeated, and the claim made upon every bishop *per consecrationem, vel translationem.*

THE preciseness of this description, and the care in wording it, shew plainly that it was a new claim, and a studied one.

IN the year 1550, Thirlby was translated from Westminster to Norwich,* and he was the first translated bishop upon whom this demand was put in execution. And in his deed of grant to the archbishop, not only the clause before-mentioned is repeated, but in the granting part he is made to say, "*Sciatis me Thomam Thirlby translatum episcopum Norwicensem ante dictum dedisse, &c.*" so careful were the officers at Lambeth to establish this new point: and probably Thirlby's Case gave them an advantage; he had been bishop of Westminster, and the first and only bishop there, and probably had never given an option on his consecration, he having perhaps no benefice to grant.

1. IT is to be observed, that this claim to take in translated bishops was first introduced into the deeds of consecrated bishops, who, as they could not be immediately affected by it themselves, did the more easily admit it.

* *Postulationem* is another clause of the scribe's. For there was no such thing as *postulatio* in Cranmer's time; and the word had never been, or could be, used before in the Option claim.

2. THAT this clause was so inconsistent with antient custom, that it dropped in Poole's time, and has never been admitted since. And yet the precedents before made upon translated bishops are still followed, though the present deeds are formed upon the old plan of granting to the archbishop * *post confirmationem*; which antiently denoted only the time when the demand was to be made, but is now construed as if every bishop *only confirmed*, and not consecrated, was bound to make the grant.

BUT it is further to be noted, that how far soever Cranmer extended this claim in this point, yet in other respects he kept within some bounds, and all the grants made to him were only for simple prebends, except in the case of Thirlby, where an archdeaconry was granted; which is the first instance where any dignity had been granted in this way. But it must be remembered, that he had no prebend in the church of Norwich to grant, in which case there was ground from the old Registers to have another benefice.

AND though Parker laid his custom, as Poole and other Popish archbishops had done before him, on consecrated bishops only, yet I find him departing from the antient practice in other respects. For

1. THE old claim was restrained to prebends, or simple benefices, but the deeds prepared by Parker took in dignities also, of which there has occurred to me but one instance before, and that in Cranmer's time.

2. THE grants are made to his *executors*.

3. THE new bishops sometimes made these grants for themselves and successors, *pro nobis & successoribus nostris*.

4. AT other times they are made for a term of twenty-one years.

* N. B. In Poole's time, and before Cranmer's time, no translated bishop had, or could have, even confirmation from the archbishop.

As Parker set forth what the archbishop's right was, and what he might legally claim in virtue of the antient custom, so far as the practice in his time went beyond this, that is to say, granting a particular benefice for a term of years, &c. or to the archbishop and executors, it must be considered as a private agreement only between him and every bishop for himself. The first vacant prebend (which was the archbishop's due) might be the richest or the poorest in the church; and it is very probable that a bishop to preserve in all events the best prebends to himself, and the archbishop not willing to stand the chance of having the worst, came to an agreement, one to give and the other to take a certain benefice.

IN this method there was no certain rule to determine what that compensation should be, nor in what manner it should be granted; for every such grant was the voluntary act of every single bishop, who was judge for himself what he would give in lieu of the old custom, and in what manner he would give it. But new bishops being too modest to contend with the archbishop, or afraid to provoke one on whom, perhaps, their future hopes and expectations depended, gave way to all the encroachments which have followed*. However, there is not in Parker's Register the least evidence, or in any other either before or after him, that any archbishop pretended a right to prescribe to any of his suffragans what they should give in lieu of this custom.

THOUGH of late years a method has been introduced for the archbishop by some one of his officers to intimate to the bishop at the time of confirmation what benefice he demands in lieu of his custom; but this secret intimation

* In a conversation once with a worthy friend of mine, and one very well acquainted with the modern practice of Options, 'it being observed to him that Dr. HALL, bishop of Bristol, had never signed an Option Deed, he answered, that the consequence of his refusal was, that he never had a translation.

has not been yet suffered to appear either in the grant itself or in any of the Registers. The deed, though prepared at Lambeth for every bishop to execute, gives not the least intimation of any right in the archbishop to chuse for himself, but the compensation made for the custom is the pure and voluntary grant of every bishop tendered for himself only. And in all deeds of this kind, from Whitgift to the present time, the granting bishop expresses his grant to be *in plenam satisfactionem* of the archbishop's ancient claim; and unless it can be supposed that a bishop is to make a compensation without judging of the value of the compensation, it necessarily follows, that the grant of a particular benefice in the present way is what the bishop has a right to make for himself, but what the archbishop has no right to demand: though indeed he has in one sense an option either of accepting the compensation offered him, or of demanding his old custom.

AND considering that each of these grants is the act of a single bishop, which can bind nobody but himself, what has been done by one, or by a hundred, acting each man for himself, can never introduce a custom to bind their successors, or entitle the archbishop to demand that of others by law, which he has always had by voluntary grants only, and such grants as could only affect the grantor, and not his successors. But these agreements proving very beneficial to the archbishop, they came soon to be countenanced by introducing a new form of the grant, expressing the gift of the bishop to be a compensation for an old right, and thereby laying a foundation for the archbishop's claiming a compensation instead of his right: and this policy has had its full effect. And when a clause to that purpose came in we shall soon see.

ARCHBISHOP GRINDAL went on in much the same way as his predecessor Parker.

GRINDAL,
1574.

THE instances of grants in his time which I have seen, are all made by consecrated bishops, excepting one, which had

had something particular in it that may perhaps account for the difference made in his case. John Piers was consecrated bishop of Rochester, and so soon removed to Salisbury, that probably the archbishop could have no benefit by his Option made upon the see of Rochester, which might probably be the reason that induced the bishop to make a new grant upon Salisbury. But here I find it necessary to observe upon the Registers at Lambeth, that it is usual for the actuary to mention by a short note in the margin what the act relates to: in the present Case there are some late marginal entries expressing the grant to be made *ratione confirmationis*, though the deeds are in the usual form, and not one word to lead the actuary to use such language in the margin.

WHITGIFT,
1583.

IN Whitgift's time, of nine instances of grants I find two are from translated bishops, but one of them was translated from Ireland, and had no relation to the province of Canterbury before, and therefore might be considered as a new bishop of England. What is more to be observed in this archbishop's time is,

1. THAT the clause by which the bishop grants *pro nobis & successoribus nostris* is brought in again in grants made to the archbishop, though such grants were contrary to law, no bishop being by law enabled so to bind his successors; and could they have been maintained by law, they would have been the most extravagant grants that ever were made, and have given the archbishop two, three, or more of the best preferments in many cathedral churches at one and the same time; for every bishop must have made good his own grants, and the grants of all before him.

2. THE clause *in plenam satisfactionem* does not appear in his first deeds, but came in in his time, and has been continued ever since.

3. THIS *satisfaction* soon came to be a very considerable thing; for the archbishop obtained a grant of the bishop

shop of St. Asaph of *three* benefices, and of the bishop of Exon no less than *twelve*, out of which, as they fell, he was to have his choice till he had pleased himself with one.

4. THE grants in this archbishop's time were made for twenty-one years.

1. IN Bancroft's time it came to be the practice to take these grants indifferently from all bishops, whether consecrated or translated, and so it has continued. BANCROFT,
1604.

2. GRANTS in his time were made to the archbishop and his *assigns* for twenty-one years, and the archbishop assigned them *over to his clerk as soon as made*.

3. THE grants were *pro nobis & successoribus*.

4. THE grants were also *in plenam satisfactionem* of the archbishop's antient custom. But that the new bishop was admitted to have a right to judge for himself what satisfaction he would make, and that the archbishop had no such unlimited power over all the bishops' preferments as to name which of them he pleased, appears clearly, not only from the nature of the transaction and the very tenor of the deed itself, but particularly from the Case of Barlow, bishop of Rochester, entered in this Register.

UPON his consecration a deed was prepared for him to execute, granting (he having no prebend in his gift) *advocationem cujuscunque rectoriæ seu ecclesiæ parochialis*. But this bishop having obtained a license to take in *commendam* any living in his own gift, did not think fit to make so general a grant, and therefore in another deed entered likewise in the Register he grants in the words following: "*advocationem cujuscunque rectoriæ seu ecclesiæ parochialis, exceptâ rectoriâ seu ecclesiâ parochiali virtute commendæ per nos eligendâ*." This probably occasioned some dispute with the archbishop; for the first deed which laid hold of all the bishop's preferments is entered early in the Register folio 36, and in the year 1605, which was the year of his consecration; but the second restraining deed

deed is entered folio 273, and after other deeds bearing date 1610, though the date of the deed itself is made to conform with the time of his consecration in 1605.

ABBOT, 1610.

IN archbishop Abbot's time the granting for twenty-one years was left off, but the clause *pro nobis & successoribus* continued.

BUT this archbishop introduced a very extraordinary clause to this effect: that if the first turn of the benefice he made choice of should have been granted away by the bishop or his predecessors, then the second turn should go to the archbishop, and *in casu consimili* the third, fourth, &c. which clause, very much improved and enlarged, is continued to this day.

FROM Abbot's time the grants have not varied much, excepting that it came at last to be understood that a bishop could not by law grant for his successors, and therefore the clause *pro successoribus nostris* has been discontinued,

OBSERVATIONS ON THE FOREGOING ACCOUNT.

IT may seem strange, perhaps, to find in the foregoing account, that the Popish archbishops used this right with moderation, and within the bounds prescribed by the antient custom, and that the Protestant archbishops began immediately, even in Cranmer's time, to extend this right, and to carry it step by step to the height at which it is now arrived. But the reason seems to be, the Popish archbishops were bound by the canon law, and could not do what their Protestant successors have done. For as the antient custom was to name a clerk to the bishop to be preferred by him, they could not at the same time name a particular *benefice*, being restrained by the Council of Lateran, which forbids not only granting but even promising

mising the *beneficium vivi & superstitis hominis**. And though consistently with the canon the first prebend that fell might be granted, yet a particular prebend or benefice could not be granted; nor could the Popish archbishop enlarge this demand, and take in archdeaconries and other dignities, or even parochial livings well endowed. For as to *dignitates & pinguiora beneficia*, even the legates à *Latere*, who were cardinals, were restrained in making reservations upon them; much more so were the archbishops of Canterbury, who were only *legati nati*; and therefore there is no sign that an archbishop of Canterbury ever demanded more than a simple prebend or benefice before the Reformation.

BUT the Protestant archbishops, being set free from the power of the pope, and not regarding the antient canon law in this respect, were from time to time extending this power; the provincial bishops submitting from time to time, for reasons easy to be understood; and it being indifferent to all others, who probably knew nothing of what was doing; or if they did, they thought it the bishop's concern, and not theirs, to look after the episcopal rights.

THE Popish archbishops kept nearly to one form, but the Protestant archbishops followed many; so many, that it is hard to conceive how they can be taken to be a proper foundation on which to build the claim of an antient immemorial custom.

1. THAT at first the archbishop named a clerk to the bishop to be provided for by him.

2. THE first prebend that became void was claimed and promised.

* For it was thought an indecent thing for clergymen, like undertakers, to be upon the watch for the death of those whom they hoped to succeed; and indeed, it can bring but little comfort to the wives and families of those who are put upon the dead list of Options.

3. A DEED was introduced to confirm this grant, and the bishops, who saw no real difference between granting by deed or making a promise which they meant to fulfil, complied.

4. NAMING a clerk to the bishop by the archbishop was omitted, and the grant was made to the archbishop, who was left at liberty to name whom he pleased, though not to name any particular prebend.

5. THE deed at first made to the archbishop only.

6. THEN to the archbishop for twenty-one years.

7. THEN to him and his assigns.

8. THEN to him, his executors and assigns.

9. THEN a particular benefice by name granted.

10. THEN the grant extended to dignities.

11. SOMETIMES three or four benefices, and in one instance twelve subjected to this grant.

12. NOT only the first turn but the second, third, fourth, &c. to the archbishop, in order to secure him one in all events.

13. GRANTS were sometimes for the bishop, the grantor, and his successors.

14. A BARGAIN was introduced between the archbishop and bishop, who grants a benefice *in full compensation* of the old custom; from which time the old custom has never been heard of but in the preamble of the grants, where it still stands, though directly in contradiction to the archbishop's claim of chusing for himself what dignity or preferment he pleases.

AND now, amidst all this variety, how are we to fix upon any antient custom to support the present practice?

THE greatest innovation of all, and the most unwarrantable, is the subjecting *translated* bishops to this custom; that is, subjecting them to pay *consecration* fees, who have not, who cannot have, consecration, and who have already paid all the fees when they were consecrated. It will be just as reasonable to make a translated bishop pay for

for the consecration dinner, as to pay this other consecration fee called an Option. And yet, as the case now stands, some bishops have paid this fee for consecration three times, some four times over, and it is remarkable that this is the only consecration fee demanded of a translated bishop; there are other fees which are due from every consecrated bishop, but this of the Option only is demanded of a translated bishop. This shews what the truth of the case is; and if it be remembered how the claim upon translated bishops was first introduced, by inserting it in the deeds to be executed by consecrated bishops who were not concerned or inclined to oppose it; and how soon the clause was dropt again, and that the practice did (one or two instances only excepted) in a manner drop with it till Bancroft's time, there will want little more to prove this to be an usurpation.

BUT whatever else may be claimed as custom, surely there can be no custom to oblige a bishop to give in compensation for the archbishop's right whatever price the archbishop shall think fit to set upon it; for if all the grants of this sort that ever were made were produced at once, they could form no custom or prescription, but every deed would appear to be, what it really is, the act of him who made it, and binding to himself only, without bringing anybody else under an obligation to follow his example.

As to the claim made now by the archbishop, of naming what dignity or benefice he thinks fit as a compensation for his custom, there does not appear to be any the least evidence to support it; for there is not the least intimation, or the least memorandum of any such right in any of the Registers from Peckham's time to this time. Nor does the present form of the deed made to the archbishop so much as suppose it; but the deed is a tender from the new bishop, and his act only.

THERE is nothing in this case more extraordinary than the conveying these Options, not only to the archbishop, but to his executors and assigns. If the archbishop himself can claim an Option *jure metropolitico*, does the *jus metropolitici* descend to his nephews or his nieces? or, Is it for the honour of the see of Canterbury, or for the good of the church in general, that three or four arch-deaconries, and as many of the best dignities in the province, should be in the disposal of him, or her, who happens to be next of kin to the deceased archbishop?

THIS was certainly no part of the antient custom, but it came in in consequence of an alteration of the old custom. The antient promises, before grants by deed were introduced, were made to the archbishop and his assigns in behalf of such clerk as he named; who was the only assignee of the archbishop then thought of, as may be seen in the earliest instance, where it is *dominus contulit gratiam episcopi Wigornensis domino G. de Bruton*. By this act of the archbishop, Bruton became the assignee of the archbishop under that promise. But when the course of things was altered, and these Options were taken by deed, which was a temporal conveyance, and to be construed by the rules of the temporal law, then the grant of the archbishop and his assigns carried the right on by a legal construction to his executors and administrators: the effect of this was not soon perceived.

BUT it was not long before the advantage was taken; and the better to secure it, *executors* and *administrators* were added to the assigns in the grant itself: and by this change things were brought to the present state. When a deed was taken in Warham's time, this consequence was not probably foreseen; but as soon as it was seen, the utmost advantage was taken; by which means some of the best preferments taken as Options have fallen into bad hands, and have been made a very bad use of, to the great reproach and scandal of the church.

It may be wondered at that the provincial bishops should submit to these innovations so much to the prejudice of their fees; especially when the king (who had a like claim upon bishopricks and religious houses) having extended his right beyond due bounds, it was taken away by act of parliament; the words of which are, “Whereas 1st Edw. III. c. 10.
 “archbishops, bishops, abbots, priors, abbesses, and prioresse, have been before this time sore grieved by the
 “king’s request and his progenitors, which have desired
 “them by threats for their clerks and other servants, for
 “pensions, prebends, churches and corrodies, so that they
 “might nothing give, nor do to such as had done them
 “service, nor to their friends, to their great charge and
 “damage; the king granteth that from henceforth he
 “will no more such things desire but where he ought.”

THIS is all the antient evidence of the archbishop’s right that has appeared to me, and I believe all the material evidence that can be found to this period. There are in the Registers several instances of the archbishops presenting to prebends and dignities too in the provincial churches; but as they were in virtue of bulls of provision granted by the Pope, they have no relation to the power under consideration.

THE right in this case might be rested upon this comparison, between the claim set up against the provincial bishops of late days, and the antient practice and custom verified from the authority of the Registers of the see of Canterbury. But there is another and a very material point to be considered: How far the claim of an Option, in the manner it is now understood, and has of late years been practised, is consistent with the law of the realm?

CRANMER’S concern to establish and authenticate his own and his officers fees upon the confirmation and the consecration of bishops, was not without reason. He being the first Protestant archbishop, and the first who acted without the character of legate of the Pope, his intention

might seem to be to separate the archiepiscopal rights and powers from the usurped powers exercised by the legate; but he had nothing less in his view. The meaning of his entry was plainly to preserve to his see the ancient and accustomed dues, and not to give up any. As his care about his fees extended to those only due upon the confirmation and consecration of bishops, and as the whole form of making bishops was altered the very year that Cranmer came to the see of Canterbury, it appeared probable that this entry in Cranmer's register of fees due to him upon making new bishops, might take its rise from the new acts of parliament relating to that matter. And this upon examination appears manifestly to be the case.

HENRY VIII. came to the crown in April 1509. Cranmer was made archbishop in March, the 24th of Henry VIII. 1533. In January following (the 25th of Henry VIII.) was held a session of parliament, the first that Cranmer sat in, in which session the act against payment of *annates*, &c. and of *the electing and consecrating archbishops and bishops*, passed.

WHEN this act was made, by which the Pope's authority was set aside, and a new method of making bishops was introduced in virtue of the act, the parliament were sensible that the validity of their bishops would be objected to, and their rights contested (such was the temper of the times), for want of canonical election, and other forms thought necessary. To obviate this difficulty, there is an express clause in the act to preserve the authority and the temporal and spiritual rights of the new bishops. This is the clause now to be considered. The words are,

It was further enacted (speaking of an act made in the 23d of the king, and confirmed in this), "That every
" archbishop and bishop named and presented by the king,
" &c. shall be accepted and obeyed as other like prelates
" of that province have been accepted and obeyed, which
" have

“ have had their bylls, &c. from the see of Rome. And
 “ also should fully and entirely have and enjoy all the spi-
 “ ritualities and temporalities of the said archbishoprick
 “ or bishoprick in as large and ample and beneficial a
 “ manner as any of his or their predecessors had or en-
 “ joyed.” In the new part of this statute (properly the
 enacting part) the like provision is made for their having
 and taking all the *possessions* and *profits spiritual and tem-
 poral*, as any archbishops or bishops might at any time
 heretofore do. When the *temporalities* and *spiritualities* of
 bishopricks are mentioned together, the meaning of the
 second term is often mistaken, but here I think there is
 no room for such mistake; for the spiritualities and tem-
 poralities in the first part of the act are in the latter part
 explained to be *profits spiritual and temporal*; and those
 who are at all acquainted with these matters know, that
spiritualities are the *fees*, perquisites, and *profits* arising
 from the ecclesiastical jurisdiction of bishops; and distin-
 guished from the rents and profits of lands and manors.

SINCE the making this act, the spiritualities of arch-
 bishops and bishops, that is, their fees and perquisites, are
 confined, as to the rates of them, by the usage and custom
 which had obtained before the 25th of Henry VIII. As
 they have a right under the act to take what such antient
 custom will warrant, so have they no right to exceed or
 carry their demands further: under this clause the present
 bishops of England hold their temporal estates, and all
 their profits and perquisites arising from their spiritual and
 ecclesiastical jurisdiction, and under this limitation they
 can no more claim *new fees* than they can claim *new lands*.
 And let it be remembered, that the bishops being intitled
 to their bishopricks in as ample a manner as they held
 them before the 25th of Henry VIII. they cannot now be
 subject to any new demands from the archbishop or any of
 his officers. And should any demand for larger fees be
 made and contested, they who make the demand have no

other plea left but what the statute has given from usage and custom, as they stood before the 25th of Henry VIII.

In the times of Popery the archbishops and bishops had other ways of compelling payment, as is manifest in an instance taken notice of before. A bishop of St. Asaph, who had been lately consecrated, refusing or delaying to provide for the archbishop's clerk, the archbishop wrote to the official to cite the bishop, and if he did not give him satisfaction to suspend him: the bishop without doubt complied, for he had no remedy but by appeal to Rome; and the archbishops, who were the chief instruments of the Pope's power in England, had too much influence in that court to leave a private bishop any hopes from such an appeal.

BUT all these kinds of process were stricken off at the Reformation, and the statute gave another remedy in this and many like cases, by empowering the archbishops and bishops to take and to recover such temporal and spiritual profits as had been by usage and custom appropriated to their fees.

THE case being thus, the archbishop (Cranmer) and his officers saw plainly that there was no way to preserve and secure their rights but by ascertaining the antient and usual rights of the see of Canterbury due upon the making of bishops. In order to this, and to preserve the memory of these antient usages in times to come, the archbishop and his officers examined into the usage and customs of times before them, and made a full and authentic entry of them in the archiepiscopal Register. It is not to be supposed that any injury was done to the see of Canterbury in this entry, and therefore without doubt all was claimed that was due.

CONSIDER now, Cranmer was present at the passing the act, and probably chiefly concerned in getting the clause to preserve his own and the other bishops rights. After the act was passed, and whilst the memory of what had

had been the usage and custom of his predecessors was fresh, he draws up an account, and enters it in his Register, of these *old* and *accustomed* rights; and the Option being entered as a *consecration* fee; must it not be admitted as a decisive evidence of what the antient custom was?

THAT Cranmer acted with this view in the above-mentioned entry in his Register, and understood the antient practice and custom of his see, to be the rule by which all his claims were to be measured, appears manifestly from another act of parliament (in which Cranmer was present) made *anno primo* Edwardi VI. in which there is a clause inserted purposely to preserve the archbishop's right to fees upon making new bishops. This statute of Edward VI. sets aside the *conge d'elire*, the election, and the confirmation of bishops, and made the king's letters patent effectual to all these purposes. Election and confirmation being taken away by the statute, it was natural for all the fees belonging to them to drop with them; but Cranmer, who sat in this parliament, took care of himself. And there is a proviso that all bishops made according to the act shall "pay, do, and yield to all and every person all such fees, interests, and duties as of old time have been accustomed to be done." It is manifest from hence, that Cranmer understood, and the parliament understood, that fees due upon making of bishops were not to exceed the old usage and practice.

IN the same act there is another clause of like import relating to the fees of the ecclesiastical court: "Provided always, that no more or other fees be taken than was heretofore accustomed." This clause and the former, though one is in the affirmative and the other in the negative, both mean the same thing. The antient practice is the standard in both cases.

WHETHER these clauses have ever been brought into judgment in the king's courts, I know not, but another

of the same kind relating to a much higher and more important concern has, and I conceive the judgment given in that great case will rule all like questions arising from these clauses; I mean the proviso in the act of the 25th of Henry VIII. c. 19. upon which the ecclesiastical law of this kingdom is founded. This statute put all the ecclesiastical laws under the examination of the king, and thirty-two commissioners to be appointed by him. But in the mean time the ancient canons and constitutions, under some restrictions, were to be used and exercised *as they were before the making this act*. The former part of this act for reforming the ecclesiastical laws was never carried into execution, and they now subsist and are executed in virtue of this proviso. Consider now what judgments the king's courts in Westminster-hall have given upon this clause.

It has been determined, that no canon or constitution can be now put in use that was not used and exercised before the 25th of Henry VIII. or otherwise than it had been used. And the proof is put upon the ecclesiastical court to shew that the law, upon which any question arises, was used and exercised as they now use it before the act.

COMPARE now those clauses, one to preserve the archbishop's spiritual profits, and the other to preserve the law of the church. The first says, That the archbishop, &c, *should have and enjoy* all spiritualities belonging to the archbishoprick in as large and ample a manner as any of his predecessors had; that is, before the making the act. The other says, The laws of the church *shall be used* as they were used before the act.

THESE clauses are both in the affirmative, and exactly in the same style. The courts of law have adjudged, that the spiritual courts cannot go a step beyond the usage as it stood in the 25th of Henry VIII. Must not the same judgment be made upon the same provision in the other case?

ease? or, Must a private right in the archbishop be more favoured and set free from the restraint which binds the general right of the church of England, especially the restraint being the same, and in the same terms in both cases?

UPON the whole, let any man consider this case and the evidence here produced, and then say, By what antient custom or usage, or by what law, or by what equity, the Option, a fee for consecration, is demanded three or four times over from the same bishops, who are and can be consecrated but once?

LET him say too, How it comes to pass that the archbishop, instead of the first prebend that becomes vacant, which may perhaps be but four or five pounds a year, and very probably not above twenty pounds, does now insist upon the very best thing every bishop has to give, and to take dignities and livings of four or five hundred pounds a year, nay of a thousand pounds a year? and this under the notion or pretence of a compensation for the old claim.

A P P E N D I X.

I THINK it proper here to subjoin the Opinion of an able lawyer, who is now dead. I had the like Opinion of several others, whose names I forbear to mention.

IN the Opinion given by sir John Strange, the late master of the rolls, he seems to differ with me as to the Case of Translated Bishops. The reason of it is, his not being apprised of the process and manner of making bishops; for which reason I have added an account of it, which will enable the reader to judge. I only add here,

that I had never an opportunity of shewing it to sir John Strange.

“ I HAVE perused and considered the papers put into my hands relating to what is commonly called the Archbishop's Option, together with the deed, which I suppose was tendered to the bishop of London to be executed by him; from all which I see no legal ground for the claim of the archbishop in the extent now contended for. What the strict right was, appears clearly from the extracts stated, and to this day (with some extension) recited in the new bishop's grants; from whence I think there can be no doubt but it is in the power of the new bishop to refuse to comply with the demand of an Option, as it is now understood and practised, or to make any other satisfaction for the customary right than by a strict compliance with that custom. The two statutes of the 25th of Henry VIII. and 1st of Edward VI. are very strong to prove that the antient right or usage before the making of those statutes cannot be exceeded or varied from; and it is my Opinion, that in point of law they cannot without the new bishop's consent.

“ BUT how clear soever the new bishop's right to refuse to comply with the archbishop's Option appears from the first footsteps of the claim, and the nature of the subsequent grants down to the present time, yet the claim upon translated bishops seems to me to stand upon a much stronger foundation, I mean the uninterrupted usage from archbishop Bancroft's time to this day; and this I think will have great weight: for though from the accounts that are given of this matter precedent to this time, there are strong reasons to conclude that the claim was originally confined to consecrated bishops only, yet the use of the word *confirmation* (which is a circumstance that occurs in the case of a translated bishop), and the subsequent usage and expressions in the grants

“grants themselves, incline me to think, that the claim
 “as to translated bishops being equally liable, with conse-
 “crated ones to provide for a clerk nominated by the
 “archbishop, is not now to be got over.”

December 9, 1749.

J. STRANGE.

I.

*The present Method of the Archbishop's making an Option,
 together with a Copy of the first Deed tendered to the
 Bishop of London.*

WHEN a bishop is to be made or translated, the arch-
 bishop by himself, or chaplains, &c. inquires what digni-
 ties, prebends, or livings belong to the see to which the
 bishop is named, and having made choice of the best in
 value, or the most likely to fall, without consulting the
 bishop, he orders a deed to be prepared for the bishop to
 execute, by which the first and next avoidance of the
 preferment *so made choice of* is to be conveyed to the arch-
 bishop and his executors; and some person belonging to
 the archbishop attends upon the bishop at the time of his
 confirmation, and requires his consent to the said Option
 before the confirmation passes.

The following Deed was tendered to the Bishop of London.

TO ALL CHRISTIAN PEOPLE to whom this present
 writing shall come, THOMAS, by divine permission, bi-
 shop of London, greeting, in our Lord God everlasting,
 and undoubted credit to these presents. WHEREAS it has
 been established by a long antient and laudable custom
 and prescription, time immemorial, as well as by the pe-
 culiar prerogative of the metropolitical church of Christ,
 Canterbury, and it has hitherto been accordingly practised
 and

and observed to this very day, without any interruption, for the archbishop of Canterbury for the time being to present and nominate to any of his suffragans chosen bishop of any cathedral church within his province of Canterbury immediately *after* the *confirmation* of such his election, one proper clerk, for whom the said bishop so elected and *confirmed* shall be obliged, as soon as an opportunity shall offer, to provide for in his cathedral church with some *dignity*, canonry, and prebend, or some other competent ecclesiastical benefice, and in the mean time to *admit* and *receive* the said clerk so to be promoted to such dignity, canonry, and prebend, or benefice, and *also* to appoint him a sufficient annual pension to be paid him until such time as the said clerk shall be sufficiently provided for with some *dignity*, canonry and prebend, or such other competent ecclesiastical benefice. Know YE therefore, that WE, the said THOMAS, bishop of London, being desirous, as far as in us lies, and as we are obliged in all things fully to comply with the rights, liberties, customs, and prerogatives of the metropolitical church of Christ, Canterbury aforesaid, for the causes and considerations aforesaid, and in full satisfaction thereof, have given, granted, and confirmed, and do by these presents give, grant, and confirm to the most reverend father in God THOMAS, by divine providence, archbishop of Canterbury, primate of all England, and metropolitan, *his executors and assigns*, the first and next advowson, nomination, presentation, and free disposition and right of patronage of the rectory of St. George, Hanover-square*, in the city of Westminster, and county of Middlesex, and within our diocese of London, and now in the possession of the reverend ANDREW TREBECK, doctor in divinity, to our patronage and disposition belonging, whensoever and as soon as the said rectory

* N. B. The bishop refusing to make this large grant, it was changed for another.

THE OPTION.

of St. George, Hanover-square, by death, resignation, cession, dismission, permutation, deprivation, or any other manner whatsoever, shall happen to be first and next vacant after the date of these presents; TO HAVE AND TO HOLD the said advowson, nomination, presentation, and free disposition and right of patronage of the said rectory of St. George, Hanover-square, for the first and next avoidance so as aforesaid to the aforementioned most reverend father in God THOMAS, lord archbishop of Canterbury, his *executors* and *assigns*, for one turn and next avoidance only, so as it shall and may be lawful to and for the said most reverend father, his executors and assigns, to nominate and present for one turn only any proper person whatsoever at his and their pleasure, by *authority* of these presents, to the said rectory of St. George, Hanover-square, howsoever it shall happen to be void, and letters of such nomination and presentation to the said rectory of St. George, Hanover-square, to make and grant to any such fit person whatsoever, and to do, exercise, and perform all and singular other things which may be needful, or in any wise convenient in or concerning the premises, or any of them, as fully, freely, and entirely, and in as ample manner and form as We the said bishop could or might do, if this our present grant or confirmation thereof had not been made: and if it shall happen that this Our gift or grant, by reason of some former gift or grant thereof made by Us or our predecessors, or upon any other reason or account, shall not have its due effect upon the ~~first~~ next avoidance of the said rectory of St. George, Hanover-square, then and in such case We will and grant that this our present gift or grant shall extend to the second, and also in like case to the third avoidance of the said rectory of St. George, Hanover-square, so that the right of patronage of the said rectory of St. George, Hanover-square, *shall not return to Us* until such time as some one proper person by virtue of these presents, upon the presentation

sentation of the said most reverend father, his executors and assigns, to the aforesaid rectory of St. George, Hannover-square, for one turn only shall be admitted and canonically instituted into the same, and also peaceably and quietly inducted into the real, actual, and corporal possession thereof, and all and singular the rights, members, and appurtenances thereof, or thereunto belonging. IN TESTIMONY whereof We have caused Our episcopal seal to be affixed to these presents, dated the day of in the year of our Lord, according to the computation of the church of England, one thousand seven hundred and forty-eight, and of the reign of our most serene prince in Christ and Lord, our sovereign lord George the Second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. the twenty-second, and of our translation the first.

II.

TO explain what is said in the foregoing papers, as to the difference between a new bishop and a translated bishop, it is to be remembered, that all translations of bishops are contrary to the canon law, and therefore a dean and chapter could not *elect* one who was already a bishop to be a bishop of their see; and no dispensation could be had but from the Pope himself; and therefore as the chapter could not *elect*, they could only in such case petition the Pope for a dispensation, to which petition two-thirds of the chapter were necessary to be consenting, and this was called a *postulation*; and the translated bishop was never called *episcopus electus*, but always *episcopus postulatus*.

IN these translations, in time of Popery, the archbishop of Canterbury had nothing to do, for *consecration* could not be repeated; and as there was no election in the case there could be no *confirmation*, and the Pope's acts of authority in translating a bishop upon a postulation of the chapter

chapter were never submitted to the judgment or confirmation of the archbishop of Canterbury; and thus the case plainly appears to be from the Registers of Canterbury.

FOR in those Registers, from the beginning of them till the time of the Reformation, there is an entry made, in the case of bishops *elect*, of the *election* by the chapter, of the *consent* of the new elect to the said election, of his *confirmation* and *consecration*; but in the case of translated bishops there is no entry relating to them, excepting only of a *mandate* from the Pope to the archbishop, reciting that he had translated such a person to such a bishoprick, and requiring and commanding the archbishop to deliver the jurisdiction to the said translated bishop; which jurisdiction had been seized, according to custom, by the archbishop during the vacancy.

UPON the whole then, as there never was a fee taken by any person whatever that could stand as a precedent to justify the modern claim of an Option, and as this claim must be governed by usage and practice, it is hard to know, under whom they claim the present practice. For neither the Pope himself, who was the prime agent in the translation, and much less the archbishop, who had nothing at all to do in it, either claimed or enjoyed such a right.

No. X.

*Of the PLACES of MEETING of PUBLIC COUNCILS of
this KINGDOM, and of AFFAIRS of PEACE and WAR
therein debated*.*

Of the places of
meeting of pub-
lic councils.

BRENNUS had ill success by following the private counsel of his flatterers; for in his absence his brother **BELINUS** had wasted and taken his country. Upon the sea the king of Denmark, who was in love with the lady, met him, and fought with him, and took the ship wherein the lady was; the ships were dispersed by storm; the king of Denmark and the lady cast upon Northumberland, and taken by Belinus. His brother Brennus, re-collecting his ships and forces, landed in Britain, and fought with Belinus, but lost the day with the death of 20,000 men and almost all his Norwegians slain, himself hardly escaping into France. Belinus having obtained the victory, *convocavit omnes regni principes intra Eboracum consilio eorum tractaturus quid de rege Dacorum faceret*, he summoned all the peers of the kingdom to York to advise with them what he should do with the king of Denmark.

Calfr. Monum.

Of the summoning of councils, and of the word *proceres*, somewhat hath been said before; that which I should speak of here is the place of meeting of the public council, which is named to be at York, the next city in honour and antiquity to London: but in regard that there

* The ensuing Tract is a part of some collections on constitutional subjects, by **BULSTRODE WHITLOCKE**, commissioner of the great seal in the time of the Commonwealth, which may perhaps throw some light on the question of the right of parliament to advise in concerns of peace and war, which has lately been very ably contended for in both houses of parliament. Other tracts of the same author, apparently in his own handwriting, are in the hands of the **EXETER**, and are intended to be brought forward in this publication.

there is much more matter upon this subject than this book will conveniently admit to be here inserted, I must refer my more large discourse hereupon to another book, where further occasion for it will be offered.

THE business about which the public council was summoned by Belinus, was to advise what should be done with the king of Denmark, then in prison, who had proposed to the king to submit himself and his kingdom to Belinus, and pay him a yearly tribute, if he would permit him, with the lady, to return free to Denmark, and that the league should be confirmed by oath and pledges; *convocatis praecuribus cum id indicatum fuisset assensum praeberunt cuncti*, &c. The peers being called together, when this was related to them they all assented thereunto. Belinus, according to their advice, released the king of Denmark out of prison; and he and the lady upon these conditions returned to Denmark.

Of matters of peace in public councils.

Galf. Monum.

THE matters of peace and leagues with foreign princes are proper for the consultations and determinations of public councils, and have been generally proposed to them.

BRUTE advised with the *maiores natu*, his public council, about matter of peace with Pandrafus, as is before in the story.

ARVIRAGUS, by the counsel of the *maiores natu*, made peace with Claudius the emperor, and agreed to pay him tribute, &c.

THE *magnates Britanniae* advised king Octavius to bestow his daughter and crown upon Maximinian, a Roman senator, for confirmation of peace between the Britons and Romans. The like was in king Arthur's time.

KING ETHELRED, by the counsel of his primates, made a peace with the Danes, and gave them a yearly tribute, *pro bono pacis*, for the good of peace.

THE like agreement for peace was made with the Danes, *rex et senatus Anglorum*, the king and the senate

of

of England, consenting to it in the same king's reign; and a third peace upon the like terms by the same king and his public council.

IN the year 1188, our king R. 1. made a peace with the king of France, *præsentibus episcopis et magnatibus utriusq. regni. Harden. p. 765. Math. Paris, p. 156. 50.* the bishops and great men of both kingdoms being present, and doubtless with their advice.

IN the year 1201, in the peace between king John and France, it was agreed, that if either king did break the peace, his barons should be absolved of their fealty, and take part with the other king against their own.

IN the year 1217, a peace was made between H. 3. and Lewis of France by advice of their counsellors, &c.

THE peace between England and Scotland, 2. E. 3. was concluded by the parliament at Northampton.

THE matter of peace between England and France was proposed to the parliament, 5. E. 8. Rot. Parl. n. 2. So were they in the parliament in 17. E. 3. Rot. Parl. n. 7. &c. Where a cause of the parliament is declared to be concerning the truce in Britain, n. 9. it is said, that as the king attempted not war without the parliament's assent, so without the same he would conclude no peace. Whereupon the lords and commons severally give their advice, that it was good to pursue the peace. The like consultation in 18. E. 3. Rot. Parl. n. 6. 22. E. 3. *ib.* n. 2. 28. E. 3. *ib.* n. 2.

THE commons, in the matter of the peace with France, do agree to the order of the king and his nobles. 28. E. 3. Rot. Parl. n. 58. 29. E. 3. *ib.* n. 5. 9.

PEACE with the Scots denied by the lords and commons, 42. E. 3. Rot. Parl. n. 7.

PEACE with France treated on, 43. E. 3. Rot. Parl. n. 1. 2. 7. R. 2. *ib.* n. 4. 16. 17. 18. 13. R. 2. *ib.* n. 1. 14. R. 2. n. 1. 16. R. 2. *ib.* n. 1. 17. R. 2. *ib.* n. 1. 6. H. 4. *ib.* n. 2. 8. H. 4. *ib.* n. 10. 3. H. 5. n. 14. 4. H. 5.

4. *H.* 5. n. 3. 14. *H.* 6. n. 1. 23. *H.* 6. n. 23. 24. and many others of the like nature in our records and histories.

IN France the first parliaments used to treat of peace; Haillan, *f.* 189. and both there and in other nations in their public councils, matters of peace were generally debated and advised upon, as being of so great weight and consequence to all men, that it was held proper for the consideration of such councils.

BELINUS, by the advice of his public council, did make a league with the king of Denmark, to which the council did assent, as to a matter very proper for their advice and concurrence. Of leagues treated on in public councils.

THE same instances which are remembered in the present chapter of public councils consulting about matters of peace, are also applicable to their consultations about leagues, and therefore not necessary to be repeated.

THE league made by the barons against king John was *communi consensu*, *Math. Paris*, p. 235. 7. by common consent of them all.

THE commons, having given aid to the king, do require, that if any league be taken with the enemy, that the profit may be laid up for the ease of the commons, 5. *R.* 2. Rot. Parl. n. 68. 6. *R.* 2. *ib.* n. 9.

A LEAGUE between the king and Sigismund king of the Romans, and their heirs and successors, is confirmed by whole assent of parliament, 4. *H.* 5. Rot. Parl. n. 14. The instrument of this alliance is upon record in the parliament rolls of this time.

A GRANT by the parliament to the queen dowager in pursuance of a league, 1. *H.* 6. Rot. Parl. n. 40.

THE league between the duke of Burgundy and the French considered in parliament, 14. *H.* 6. Rot. Parl. n. 2.

LIKEWISE a league to be had between England and France treated on, 23. *H.* 6. Rot. Parl. n. 2. 8. *E.* 4. Rot. Parl. 11. 27.

AMONG the Jews it is alledged that their great senate *cognoscebat de fœderibus*, Shiccardus c. *Elect. Theor.* 2. *Massicht. Sank. Maschenos & Talmud*; had cognizance of leagues; and that made with the Gibeonites was by assent of the princes. Joshua, c. 9. v. 15. "And Joshua made peace with them, and made a league with them to let them live, and the princes of the congregation sware to them."

Of matters of
war in public
councils.

BELINUS, governing the whole island from sea to sea in quiet, confirmed the laws which his father made; he caused the great highways cross the island to be made.

BRENNUS his brother, not obtaining succour in France, went to the duke of the Allobroges, that is, of Savoy and Piedmont, where he was honourably received, married to his only daughter; and after his death succeeded him in that kingdom, where he raised an army and transported it into Britain. His brother Belinus being ready with another to fight with him, the mother of them both came to Brennus in the midst of his troops, and fell upon his neck, kissing him, and, shewing him her breast which gave him suck, with pathetic arguments of a mother persuaded him to go unto his brother and forbear the battle. Belinus met his brother with all affection, and by this mediation of the mother the brothers were reconciled, and came together to Troynovant, London; where, *consilio cepto quid facerent*, having taken council what they should do, they prepared an army together to invade France.

THAT the matter of war is proper for the advice of public councils, the same authorities which are before cited for matters of peace and league are pertinent likewise to this subject, and need no recital.

It hath been the constant practice, as throughout all our stories doth appear, to advise with public councils in matters of war.

THIS was done by Brute, Belinus, Cassivelaune, Arviragus,

Viragus, Vortigern, Aurelius, Ambrosius, Arthur, and generally all the British, Saxon, Danish, Norman, and other kings of this nation, and of all other countries; it being a thing so proper and natural in matters of that great moment, as war is to advise with council about, and so safe and prudent for a prince not to adventure upon without the counsel of others.

THE several stories do manifest this, and are too many to be particularly mentioned.

MATTERS of war with France were treated on in parliament 6. *E. 3.* Rot. Parl. n. 1. 17. *E. 3.* n. 9. 18. *E. 3.* n. 8. 25. *E. 3.* n. 7. 42. *E. 3.* n. 7. 45. *E. 3.* n. 1. 47. *E. 3.* n. 2. 50. *E. 3.* n. 2. 51. *E. 3.* n. 12. 2. *R. 2.* n. 6. 19. 25. 3. *R. 2.* n. 5. 4. *R. 2.* n. 3. 6. *R. 2.* n. 3. 7. *R. 2.* n. 3. 8. *R. 2.* n. 2. 9. *R. 2.* n. 4. 10. *R. 2.* n. 2. 11. *R. 2.* n. 1. 14. *R. 2.* n. 1. 15. *R. 2.* n. 2. 17. *R. 2.* n. 1. 2. *H. 4.* n. 12. 4. *H. 4.* n. 3. 6. *H. 4.* n. 3. 11. *H. 4.* n. 2. 2. *H. 5.* n. 5. 3. *H. 5.* n. 3. 4. *H. 5.* n. 3. 7. *H. 5.* n. 1. 14. *H. 6.* n. 2. 27. *H. 6.* n. 17. 29. *H. 6.* n. 1. 8. *E. 4.* n. 28. 14. *E. 4.* n. 18.

CONSULTATIONS in parliament touching the war with Scotland, and other parts, are in the rolls before cited, and in 6. *E. 3.* Rot. Parl. n. 6. 50. *E. 3.* n. 2. 1. *H. 4.* n. 81. 8. *H. 4.* n. 2. 17. *R. 2.* n. 1. 1. *H. 5.* n. 9.

I HAVE taken the pains to insert the particular parliaments wherein matters of war were treated on, that it may be seen how, in all times of war, the advice of the parliament was therein required, and that by our wisest and best kings; and the same course was continued even to our times.

SOME do take the true state of this question to be, that the king, if he please, may commence a war against any foreign enemy, but that he cannot maintain it without the consent of parliament, unless he have sufficient of his own means to defray the charge of it, because he can levy no money without assent of the parliament; nor can the king compel

compel any man to serve him in his wars without the like consent.

As it is to this day among the Swedes and Goths, where the king can raise no money without the Ricksdagh, nor compel any to serve him in his wars abroad but by their act. €

AND this is also the law in Germany, and other countries, and taken to be grounded upon the law of the Jews: their great senate *cognoscebat de bello, Shiccardus jus D. g. Hebraeor. c. Elect. Theot. 2.*; had cognizance of wars, which could not be undertaken, *nec omnes obligabant, invito Synedrjo, Schiccardus c. Bellum. Mayin Melach. c. 2.* nor did bind all without the consent of the Sanhedrim. It is further said of the king of the Jews, that he being to begin a war with any of his neighbours, *necessario prius deliberabat cum magno senatu, citra cujus consensum miles non exibat. &c.* was of necessity first to consult with the great senate, without whose consent the soldier was not to go forth.

WITH this agrees the law of England in terms, and that of Sweden; and it was the law of Germany and of most other countries; and certainly where chief magistrates do advise with their great senates in matters of war, they commonly prosper; but where they do engage in wars upon their own judgment, or by advice of some few persons, and perhaps flatterers, it seldom thrives, but mischief and prejudice accompanies such undertakings; as it did that of Brennus, who, by such advice, brought soldiers from Norway and invaded his brother, to his own no small detriment and hazard: but when both brothers joining together advised with a public council about matter of war, and by their council undertook it, the success thereof proved very great; for they, by this advice, transporting their army into France, subdued all that country and the several kings of it, and of other countries; went to Rome, wasting Italy.

who made a peace with them by great gifts of silver and gold, and a yearly tribute.

FROM thence they went to Germany, whom the Romans assisted, contrary to their league with the British brothers; to revenge which, Brennus marched to Rome with part of the army, Belinus with the other part of the army vanquished their enemies in Germany, and overtook his brother at the siege of Rome, where they hung twenty-four noble Romans who were hostages for the peace; and after a sharp fight with the consuls on the one side of them, and the citizens issuing out on the other side of them, the brothers with a great slaughter obtained the victory, Gabius, one of the consuls, being slain, and Porfenna, the other, taken prisoner: they also took the city of Rome itself, and bestowed the hidden wealth of it among their soldiers. Brennus staid and died in Italy; Belinus returned to Britain, where he governed in peace, built Gloucester, Billingsgate, and the great Tower in London, where he was buried.

No. XI.

LORD LOUGHBOROUGH'S ARGUMENT *on FINES*
ON ADMISSION TO COPYHOLD ESTATES, *in the CASE*
of GRANT versus ASTLE, in the COMMON PLEAS.

THE Case in which this argument was delivered came on at the assizes for the county of Essex, when a general verdict was found for Astle, subject to the opinion of the court of common pleas on a case reserved; which stated, That Astle was lord of the said manor of which the tenements mentioned in the declaration were parcel, and that the same were held of Astle, as lord of the said manor, by copy of court-roll, at the will of the lord, according to the custom of the said manor, and *that the fine was arbitrary*; that Grant had craved admission on the death of his father, and was accordingly admitted in fee to all the said copyhold tenements, upon which admission a fine of 98*l.* 18*s.* 4*d.* was assessed; that the said fine of 98*l.* 18*s.* 4*d.* appeared to be two years improved value of the said tenements to which Grant was admitted, after deducting 2*l.* 19*s.* 8*d.* for the *quit-rents*, which were 1*l.* 9*s.* 10*d.* a year; that Astle had not deducted anything out of the said fine for *land-tax*; that Grant had paid 84*l.* 5*s.* 8*d.* into court upon the common rule.

THE question stated upon this Case was, Whether the lord of the said manor was bound to allow any sum of money for *land-tax* out of the said fine? If he was, a nonsuit was to be entered; if not, the verdict to stand.

AFTER the Case had been argued at the bar, lord Loughborough delivered the Opinion of the court to the following effect:

LORD

LORD LOUGHBOROUGH. ' This question was truly
' considered as of great concern to the public at large: it
' has undergone a very deliberate examination, and we are
' all of opinion, that the lord of the manor is not bound to
' make any deduction for the *land-tax* out of a fine due for
' admission on a descent, which is the present case.

' THE grounds which led us to this determination lie
' in a very narrow compass.

' IN the *first* place the *land-tax* is annual, and, however
' probable its continuance may be, there can be no legal
' presumption as to the future intentions of the Legislature,
' and there can be no deduction, by anticipation, of an un-
' certain future burthen.

' IN the *second* place the tax, though commonly called
' a tax upon land, is not in its nature a charge upon the
' land; it is a tax upon the faculties of men, estimated,
' first, according to their personal estate; secondly, by the
' offices they hold; and lastly, by the land in their occu-
' pation. The land is but the measure by which the fa-
' culties of the person taxed are estimated; and where it is
' intended by the Legislature that the burthen should not
' ultimately rest upon the person charged, a power of de-
' ducting is given him by the act; as in the case of rents,
' and other certain outgoings: but no deduction is allow-
' ed for fines, which are uncertain.

' IN the *last* place, this claim being new, and there being
' no precedent nor instance to support it, the usage of al-
' most a century is a strong proof that no such deduction
' ought to be made, and amounts to a contemporary and
' permanent exposition of the *land-tax* acts in favour of the
' lord.

' THESE are the reasons which have weighed in the
' opinion of the court to determine this Case in the man-
' ner I have stated.

' BUT the subject having led to much curious and in-
' teresting inquiry into the nature of copyhold estates,

‘ and the progressive advancement of the rights of the tenant, I wish to state a few circumstances that have occurred to my observation, for the inaccuracies of which I only am answerable. I do it in order to excite the investigation of persons more able and more diligent; particularly of those who are acquainted with the antiquities of this country as well as its laws: and I wish it may have the effect of engaging the attention of the plaintiff in the present cause, who I am sure is very able to make an inquiry of the nature I am going to point out.

‘ COPYHOLD tenures are agreed by all writers to be more antient than the Norman government. In some of the most approved authors the copyhold tenure of land is derived from the state of *villenage*, which now happily forms a very obscure title in the law. It is supposed, that all copyholders were originally villeins, and that by the mitigation of villenage, and the progress of enfranchisement, the estate grew by degrees to be more free and permanent, till it came into the condition of a copyhold.

‘ I CANNOT help doubting whether that deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that in those parts of Germany from whence the Saxons migrated into England, there exists *at this day* a species of tenure exactly the same with our copyhold estates, and that there exists likewise *at this day* a complete state of *villenage*; so that both stand together, and are not one tenure growing out of another, and by degrees assuming its place. In East Friesland, the dutchy of Brunswick, and other northern parts of Germany, there are villeins in gross, and villeins regardant, with the same rigour which our law formerly knew. There are also copyhold tenants who are freemen, but whose estates are alienable only by license, and are transmissible by descent; and in both instances

instances they must pass through the courts of the lord. Nay, in the antient seat of the Anglo-Saxons there exists at this day that peculiar descent to the youngest son which we call *borough English*; of which the name shews the original.

WHAT I have stated I found in a very accurate treatise of German law by Selchow, one of the professors of the university of Gottingen, entitled, "*Elementa Juris Germanici*,"

THIS seems sufficient to negative the idea that copyholds sprang out of villeins. In England villenage has ceased and copyholds remain; but here, as in other countries, they both prevailed at the same time.

IT is not difficult to conceive that, whenever agriculture became an object of respect in the northern and western parts of Europe, those who applied themselves to the cultivation of land, though inferior in point of dignity, would be equal in point of freedom to those whose only profession was arms. The copyhold tenants were husbandmen; their persons were free; and in that respect they were as much above the villeins as, in point of consequence, they were inferior in a military age to those who had arms in their hands. Their lands were held of a lord who could defend them, and who, in return for that defence, was entitled to certain profits and advantages founded upon paction express or presumed.

A FINE to be paid on the change of a tenant is almost a constant incident of a copyhold estate, and it does not seem to have been long before the end of the reign of queen Elizabeth that courts of law interposed to moderate the exercise of the lord's right to a fine, where the custom had left the amount of it uncertain; for it is pretty remarkable that a question on this subject was depending in the 36th and 37th of queen Elizabeth, in the court of king's bench, and in this court, at the same time: you will find it in 1, Rolle's Abr. 507. and in the

‘ contemporary reporters. The question was this : Under
 ‘ what circumstances a refusal to pay a fine should amount
 ‘ in a court of law to a forfeiture of the copyhold estate ?

‘ IT was contended upon the part of the lord, that the
 ‘ mere non-payment of the fine assessed would amount to
 ‘ a forfeiture. *

‘ THAT proposition appeared too strong even in a court
 ‘ of law ; however, the court of king’s bench, in the
 ‘ 36th of Elizabeth, held, that after the demand ~~made~~ ^{made}
 ‘ by the lord, and the refusal of the tenant to pay, point
 ‘ the fine should be unreasonable, the estate should ^{be}
 ‘ feited.

‘ THIS court, a term or two afterwards, in the Case
 ‘ of Jackman v. Hoddesdon, reported in Cro. Eliz. 351.
 ‘ held, that in such case there was no forfeiture. The
 ‘ court of king’s bench (as has been just stated) had held
 ‘ the contrary, but the opinion of this court prevailed ;
 ‘ and in the 43d of Elizabeth, in the Case of Hobart v.
 ‘ Hammond, reported in 4. Co. 27, b. the court of king’s
 ‘ bench, referring to the Case of Jackman v. Hoddesdon
 ‘ in the common pleas, varied their idea, and held, that
 ‘ the refusal to pay an unreasonable fine was no forfeiture
 ‘ of the estate. From the manner in which the report of
 ‘ that Case is stated, and the anxiety with which the Judges
 ‘ support the proposition, one would be apt to conclude it
 ‘ had not been of great antiquity.

‘ A FEW years afterwards, in the 6th of king James,
 ‘ in Willowe’s Case, 13. Co. 1. this point again occurred,
 ‘ and the law was not then taken to be so settled as for the
 ‘ court simply to say, “ the point is so ; ” but the report
 ‘ states a great deal of reasoning and argument to support
 ‘ the position, that the Judges not only might, but ought,
 ‘ either upon the facts appearing upon a demurrer, or upon
 ‘ evidence, to go to a jury, to determine what was a rea-
 ‘ sonable fine ; and in that case the court held, that two
 ‘ years value was an unreasonable fine.

Thus

‘THUS then the matter rested; the fine was to be assessed by the lord, and whether it was reasonable or unreasonable, was a question for the consideration of the court and jury; and it would obviously be subject to much fluctuation and uncertainty. To prove upon a trial the annual improved value of land, and then to calculate how much of that value should be paid for a fine, was likely to be attended with so much dissatisfaction, that recourse would frequently be had to the court of chancery, which had always relieved against the forfeiture, and taken upon itself, without a jury, to determine what should be a reasonable fine.

‘LORD-KEEPER COVENTRY, in the 5th of Charles I. and again, in the 12th of the same reign (1. Chan. Rep. 18. or 33. (a), and *ibid* 51, or 96. (b)), held, that one year’s improved value was a reasonable fine—guarding the defect—that one year’s value should not be counted a fine certain, but referable to the discretion of the court whether it was reasonable, and that the payment was then directed because it was reasonable.

‘IN the 29th of Charles II. in the year 1677, lord Nottingham, in the Case in 2. Rep. in Chan. 135. (c), held, that two years value was a reasonable fine; and at the time of this determination, in 1677, two years value was not a much higher payment than one year’s value had been at the time of lord Coventry’s determination. The interest of money had been reduced, and from that and other causes the value of land had risen. One year’s value might be nearly as large as an *aliquot* part of the selling price of land in the 5th of Charles I. as two years value at the time of lord Nottingham’s determination. From that time to the present the idea of two years value being a reasonable fine, in the case of a fine arbitrary (or, in the more proper phrase, *arbitrable* (d)),

(a) *Middleton v. Jackson*.

(c) *Morgan v. Scudamore*.

(b) *Popham v. Lancaster*.

(d) *Cro. Eliz.* 351.

' has prevailed uniformly; and the adhering to this rule has
' been a matter of very great convenience, though it can-
' not be said to be a matter of strict justice.

' Two years value, the interest of money being fix
' *per cent.* as at the time of lord Nottingham's determina-
' tion, is a much larger proportion of the selling price of
' a copyhold estate than the same number of years purchase
' the interest of money being at five and four *per cent.*
' But to follow the variations of price would create a
' confusion in this property, would occasion a depreciation
' it, and is not the true interest of the copyholder.
' lic convenience therefore, that great source of law and
' justice, has established the authority of the rule laid down
' by lord Nottingham; and it is to be observed, that the
' decision was not above eighteen years prior to the first
' land-tax act. From that time to the present hour not an
' instance can be found where there has ever been a deduc-
' tion from the two years value (then fixed as the utmost
' amount of a fine) upon account of the land-tax.

' It seems therefore to me much better for the inte-
' rest of copyhold tenants, and for the public advantage,
' as there is a great deal of that property in the kingdom,
' that the fine to be paid upon the renewal of a copyhold
' estate should be strictly kept to that sum which has sub-
' sisted now above a century, namely, two years improved
' value, without any deduction except for quit-rents, which
' can hardly be called a deduction, for the lord must allow
' that which he has received or is to receive*.'

* On this judgment of the court of common pleas a writ of error was brought in the king's bench, whereon a *venire de novo* was granted, and the cause was accordingly again tried before Justice Ashurst at the Lent assizes for the county of Essex, 22. Geo. 3. when a verdict was found for the plaintiff *ASTLE*, subject to the determination of the court of king's bench, "Whether the plaintiff was bound to prove the exact sum laid?" On which lord Mansfield delivered the Opinion of the court in favour of the defendant, for whom judgment was accordingly given. The Case is reported in Douglas 722; from whence the foregoing Argument of lord Loughborough in C. P. is extracted.

No. XII.

CASE *On the CONSTRUCTION of MARRIAGE ARTICLES
and CROSS REMAINDERS; with OPINION of MR.
BOOTH, ARGUMENT of MR. WEDDERBURN,
and DECREE of LORD CHANCELLOR APSLEY.*

By articles of agreement made between Charles duke of Richmond (father of Charles then earl of March, afterwards duke of Richmond), of the one part, and William late earl Cadogan, father of lady Sarah Cadogan, of the other part, in view and consideration of a marriage then intended between the said earl of March and lady Sarah Cadogan, the said earl Cadogan did covenant that he would acknowledge unto the duke a recognizance or statute staple in the penalty of 100,000*l.*; which recognizance is thereby declared should be a security, that the said earl, his heirs, &c. should, within three years next survived, and there was no issue of the marriage, to lord Cadogan in fee; but if she survived, and there was issue, then, as to a moiety, to the lady for life, and as to the other moiety during her life, and the whole after her death to the children of the marriage, as lord and lady March should appoint; and for want of appointment, to all the children (the eldest son always excepted) as tenants in common in tail; and for want of such issue, to the eldest son in tail; and for want of such issue, to lord Cadogan in fee. The money is afterwards laid out in the purchase of lands, which are conveyed to the then subsisting uses of the articles. Lord and lady March die without making any appointment, leaving an eldest son and six younger children. The eldest son afterwards purchases the trust estates; has them conveyed to him by an act of parliament on his engaging to pay certain pecuniary portions to the younger children; the portions of the younger sons to be paid at twenty-one, and those of the daughters at twenty-one, or marriage: and in case of their deaths before such respective periods, the same to be paid to the persons who would be intitled thereto under the articles. One of the daughters afterwards dies under twenty-one unmarried.—The several OPINIONS of Mr. BOOTH and Mr. PATTERSON, whether the eldest son was intitled to the portion of the deceased daughter, or, a court of equity would supply the want of cross remainders in the articles, and direct the portion of the deceased to be divided amongst the surviving younger children?

N. B. To this Case, and the Opinions thereon, is subjoined a Note of the same Case, as afterwards argued before lord chancellor APSLEY, who decreed in favour of the younger children,

after

after the said marriage should be had, lay out the sum of 60,000*l.* in the purchase of lands, tenements, or hereditaments, in England, of an estate in fee simple; which, when purchased, should be settled and assured; and the interest and produce of the monies, until such purchase should be made, should immediately from and after the end of the said three years be applied to the use of the said earl Cadogan during his life, and after his death, to the use of the said earl of March during the joint lives of the said earl of March and lady Sarah Cadogan; and if she should survive the said earl of March, her intended husband, without a child or children of the marriage, to the use of the said earl Cadogan, his heirs and assigns for ever; and if she should survive the said earl of March, and there should be issue of the marriage then living, or born afterwards, then, as to one moiety thereof, to the use of the said lady Sarah Cadogan for life; and as for the other moiety thereof during her life, and the whole after her death, to the use of all and every the child and children of the bodies of the said earl of March and lady Sarah Cadogan, *viz.* if but one such child, to such only child and the heirs of the body of such child; and if there should be two or more such children, then to all and every such children (the eldest son, if there shall be such, only excepted), and for such estate or estates and in such manner and proportions as the said earl of March and lady Sarah Cadogan, his intended wife, should by any deed or writing declare, direct, limit, and appoint the same or any part thereof, so as to every child of the said marriage (the eldest son only excepted) an estate of the value of 10,000*l.* at the least should be sufficient in value for that purpose; and in default of such appointment, to the use of all and every such children of the said earl of March to be begotten on the body of the said lady Sarah Cadogan (the eldest son, in case there should be any, always excepted), equally to be divided between them, share and share

share alike, as tenants in common, and not as joint tenants, and to the several and respective heirs of their respective bodies issuing; and for want of such issue, to the use and behoof of such eldest son, if there should be any, and the heirs of his body lawfully to be begotten; and for want of such issue, to the use and behoof of the said earl Cadogan, his heirs and assigns for ever.

THE marriage was afterwards had; and the said earl Cadogan acknowledged, before the lord chief justice of the court of common pleas, at Westminster, a recognizance, in the nature of a statute staple, in the penalty of 100,000*l.* but died before he laid out the said 60,000*l.*, or any part thereof.

THE said earl Cadogan by his will ratified the said marriage articles, and gave whatever estate he had, or was intitled unto, after the decease of the said duke and duchess of Richmond without issue of their bodies, by virtue of the said articles, to his youngest daughter lady Margaret Cadogan, and her issue, with several bequests over, as therein is mentioned; and did among other things give and devise unto Henry earl of Shelburne, John lord Carteret (afterwards earl Granville), and the said testator's brother colonel Cadogan, afterwards Charles lord Cadogan, their heirs, executors, and administrators, all his the said testator's real estates in England, and all his personal estate not therein before disposed of, in trust to sell and dispose of the same, and by and out of the monies thereby arising pay and satisfy, in the first place, all such sums of money as he had covenanted to pay by virtue of the said articles, and appointed his said trustees to be likewise trustees for securing and laying out the same accordingly, and made also executors of his said will.

27th June 1726.
Will of the said
earl Cadogan.

BY a decree in chancery made in a cause between the said Charles late earl of March, then duke of Richmond, and the said Sarah Cadogan his wife, then duchess of Richmond, and others, plaintiffs, and the said Charles

11th July 1728.
Decree in chancery. Duke and duchess of Richmond, and others, against lord Cadogan's executors, and others.

lord

lord Cadogan, Henry earl of Shelburne, and John lord Carteret, afterwards earl Granville, the executors and trustees of the late earl Cadogan, and others, defendants, it was amongst other things ordered and decreed, that the executors and trustees named in the said earl Cadogan's will should sell all his real and personal estates (not specifically devised), with the approbation of the master; and out of the money arising by such sale, the said 60,000*l.* was to be, in the first place, paid and put out in the purchase of lands, with the said master's approbation, and settled to such of the uses in the said marriage articles as were still subsisting (except the remainder to the earl Cadogan and his heirs), and that remainder was to be vested in the trustees till the further direction of the court.

Issue of the marriage.

THE said Charles duke of Richmond, late earl of March, had issue by the said Sarah duchess of Richmond, his wife, late lady Sarah Cadogan, Charles now duke of Richmond, his eldest son, and six younger children, *viz.* lord George Lenox, lady Georgina Caroline, who intermarried with the right honourable Henry Fox, Esq. (now lord Holland), lady Amelia, who intermarried with James earl of Kildare (now duke of Leinster), lady Augusta Louisa, lady Sarah, and lady Cecilia Margareta, and no other issue: to, or amongst, whom no appointment was made by their father or mother of the said 60,000*l.* or the lands to be purchased therewith, pursuant to their power in the said marriage articles.

29th Feb. 1749.
Will of Charles
late duke of
Richmond.

THE said Charles duke of Richmond (late earl of March), by his last will, made the said Sarah duchess of Richmond, his wife, who survived him, guardian of four of his said younger children, *viz.* lord George Lenox, and the ladies Augusta, Sarah, and Cecilia Margareta, who were then minors, during his wife's life; and after her death, appointed Thomas Holles duke of Newcastle, William earl of Albemarle (both since deceased), the said

James

James earl of Kildare (now duke of Leinster), Charles lord Cadogan, Henry Fox (now lord Holland), and Thomas Hill, esq. since deceased, their guardians during their respective minorities.

THE said Sarah duchess of Richmond afterwards departed this life.

THE said master by his report certified, that the sum of 57,409l. 19s. 8d. part of the said 60,000l. had been laid out pursuant to the said decree, with his approbation, in the purchase of the manors of Charleton and Singleton, and other estates mentioned in the schedule to his said report annexed, and that there remained the sum of 2590l. os. 4d. residue of the said trust-monies, to be laid out in the purchase of lands pursuant to the said decree; and that the only remaining fund to answer the same consisted of 1557l. 18s. 7d. Bank Annuities, then standing in the name of the said trustees.

26th Feb. 1756.
Master's Report.

By an act of parliament for vesting the forests and manors of Singleton and Charleton, and other lands and tenements in trustees freed and discharged from the estates and trusts to which the same then were subject, and for other purposes therein mentioned, reciting to the effect herein-before stated: and further reciting, that the said younger son and daughters of the said late duke and duchess of Richmond were, by virtue of the said marriage articles, severally seised of and entitled to the lands then purchased, and remaining to be purchased, with the said 60,000l. as tenants in common, to them and the heirs of their respective bodies, with cross-remainders of such of their respective shares, in case of any of their deaths without issue, to the survivors of them in common in tail, with other remainders over; so that the said Henry Fox (now lord Holland) and lady Georgiana Caroline his wife, and the said earl of Kildare (now duke of Leinster) and Amelia his wife, were then enabled, and the said lord George Lennox, and the said ladies Augusta, Louisa, Sarah,

K.G.II. 1757-8,
Act of Parliament.

rah, and lady Cecilia Margareta, when they should attain their several ages of twenty-one years, would be enabled, to suffer recoveries of their respective undivided sixth parts of the said premises, and thereby bar the intails and remainders created by the said marriage articles, and also the reversion and remainder in fee of the premises devised by the will of the said earl Cadogan; but that it would be very prejudicial to all the parties interested therein that the said estates should be severed and divided into ~~fix~~ parts among the said children of the said late duke and duchess of Richmond:

Proposal.

RECITING further, that the said Charles now duke of Richmond, in order to prevent the great prejudice and inconvenience which would happen by a division of the said estates, had proposed to take the said purchased estates and the said 1557l. 18s. 7d. Bank Annuities so remaining, and, in consideration thereof, pay and give security for the said sum of 60,000l. in manner following, *viz.* to pay to the said Henry Fox (now lord Holland) 10,000l. to the said earl of Kildare (now duke of Leinster) 10,000l. and give security to pay the said George lord Lenox 10,000l. at his age of twenty-one, and for payment of 10,000l. a piece to the said ladies Louisa, Sarah, and Cecilia Margareta, on their attaining their respective ages of twenty-one years, or days of marriage respectively; and in case of the death of the said lord George Lenox under the age of twenty-one years without issue, or of the said three younger sisters before their respective ages of twenty-one and unmarried, for the payment of their respective 10,000l. to such person or persons as should be intitled by virtue of the said marriage articles, earl Cadogan's will, and decree, to their respective shares of the said purchased estates and Bank Annuities:

RECITING also, that the said Henry Fox (now lord Holland) and his wife, and the said earl of Kildare (now duke of Leinster) and his wife, were willing and desirous

to accept the said proposal, but the said four other younger children, being then minors, could not consent thereto; and therefore it had by an order of court been referred to the said master to see whether it would be for their benefit that the said proposal should be carried into execution. And the said master, by his report dated 7th Feb. 1758, certified, that he conceived the same to be for their benefit; which report was confirmed; but by reason of the minority of the said four youngest children, the said proposal could not be carried into execution without an act of parliament, in order to discharge the said estates already purchased, and the said 1557l. 18s. 7d. remaining to be laid out in lands from the estates, uses, and trusts to which the same were then subject.

It was enacted (among other things), that the said manors, messuages, lands, and the hereditaments in the act mentioned, which had been purchased with the said 57,409l. 19s. 8d. part of the said 60,000l. as aforesaid, should and were thereby vested in and settled upon George earl of Albemarle, Charles lord Cadogan, and George Bridges Brudenell, trustees therein named, and their heirs, to the use of them, their heirs and assigns, absolutely freed and discharged of and from all the estates, uses, trusts, bequests, powers, limitations, provisos, charges and agreements whatsoever created, devised, expressed and declared of and concerning the same by the said marriage articles, the will of the said William earl Cadogan, and the said decree, or any of them, in trust to convey and assure the same to the said Charles (now duke of Richmond), his heirs or assigns, or as he or they should appoint, upon his the said duke's payment of 10,000l. a-piece to the said Henry Fox (now lord Holland), and to the said earl of Kildare (now duke of Leinster), and the further sum of 10,000l. to the said trustees appointed by the act, and entering into and acknowledging before the said lord chief justice of the court of common pleas a recognizance in

the nature of a statute staple to them the said trustees, in the penalty of 60,000*l.* and in the mean time to such person and persons, and for such estate and estates, as would have been intitled to the same if this act had not been made.

AND it was further enacted, that on the said duke of Richmond's paying the said 10,000*l.* a-piece to the said lord Holland and duke of Leinster, and the further sum of 10,000*l.* to the said trustees, and entering into such statute staple as aforesaid, the said 1557*l.* 18*s.* 7*d.* Bank Annuities should be transferred to the said duke of Richmond for his own benefit, and that the same should not be subject or liable to any of the uses, trusts, devises, bequests, limitations, or agreements mentioned in the said marriage articles, or the will of the said William earl Cadogan, or the said decree, or either of them, provided, and it was further enacted, that the said statute staple from the said duke of Richmond to the said trustees, and the said 10,000*l.* to be paid to them, should be a security only for the due performance of the said proposal and payment of the said four several sums of 10,000*l.* each upon the contingencies therein-before-mentioned, with interest at four pounds *per cent. per annum*; and that until one of the said four sums should become payable, it should be lawful for the said trustees, with the approbation of the said duke, to place out the said 10,000*l.* so to be paid to them on government or real securities, at interest in their own names, in order to be applied towards the payment of the first of the said four sums of 10,000*l.* each, which should become payable, and the interest thereof, at four *per cent.* in the mean time.

AND it was further enacted, that upon payment of the said three several sums of 10,000*l.* to the said lord Holland, the duke of Leinster, and the said trustees as aforesaid, by the said duke of Richmond, and on his entering into the said recognizance to the said trustees, he the said duke

and his heirs, and all other persons to whom, by his appointment, any conveyance should be made of the said manors, hereditaments, and premises, or any part thereof, should at all times after such conveyances made, hold and enjoy the said manors, hereditaments, and premises freed and absolutely discharged of, from, and against all and every the uses, trusts, estates, powers, provisos, limitations, and agreements limited, created, expressed, and declared, as aforesaid, concerning the same; and that they the said trustees should and were thereby indemnified against all demands from all persons to whom or to whose use the said manors, hereditaments, and premises had been limited and settled in pursuance to the said marriage articles, the will of the said William earl Cadogan, and the decree as aforesaid.

IN pursuance of which act the duke paid or secured to lord Holland, the duke of Leinster, and the said trustees, the said three sums of 10,000*l.* and entered into the said statute staple in the sum of 60,000*l.*; and the said real estates that had been purchased as aforesaid were thereupon conveyed to the duke and his heirs pursuant to the said act.

THE said lady Cecilia Margareta Lenox, the youngest daughter, died unmarried and intestate, not having attained her age of twenty-one years, and her said portion of 10,000*l.* remaining unpaid to her, but standing secured by the said recognizance from the duke to her good liking, his grace having paid her interest for the same.

Upon the —
day of —
1769.

THE duke, who was the eldest son, and lord George Lenox, the second son, and the other three daughters, are all living.

Who is intitled to the said 10,000*l.* the portion of the said lady Cecilia? and, Whether will the same go to all, or which, of her said brothers and sisters? and, How and in what manner, shares, or proportions?

Mr. BOOTH'S
OPINION.

THIS Case requires a great consideration; and his grace the duke of Richmond having been so indulgent to me as not to require any precise Opinion from me, his grace satisfying himself with having the difficulties of the Case, as they appear to me, pointed out, I shall here lay down, under distinct heads, such grounds and distinctions as seem to me to be the fittest for the throwing that kind of light upon this Case which may be necessary for the coming at some degree of insight into the difficulties which attend it: It is not necessary that these distinctions should be all taken as fixed principles; some of them may be considered as only private conclusions or assumptions of my own.

FIRST, I think that a portion is generally understood to be that part or share which is appointed or allotted by the parent for the provision or livelihood of a younger son or daughter out of the general mass of the landed estate, which is generally meant to be preserved as entire as possible for such of the descendants as in an hereditary course of succession shall become the head of the family by the laws established in this country.

THE right of succession to lands here first devolves on the males, where the right of primogeniture takes place, and then on the females in equal shares and proportions.

SECONDLY, Where in a marriage settlement any sum of money is placed or agreed to be placed in the hands of trustees, so as to constitute a capital fund, which is to be laid out in the purchase of lands to be settled to the use of the intended husband and his wife, and then subject to a term of years for raising portions for younger children (or without any such term), to the first and other sons of the marriage in tail, and failing such, to the daughters, &c. such capital sum, till the same is laid out, is considered as land or real estate; and not as money or personal estate.

THIRDLY, Where, under any settlement actually made before or after marriage, any lands already purchased, or
agreed

agreed to be purchased, are in a formal manner made subject to the raising of portions for younger children; and it is there said, that in case there are more such children than one, a particular sum shall be raised for and shall be shared and divided amongst all such children in equal shares and proportions, and that the same shall be paid at their ages of twenty-one years, or on the days of their marriage; unless there is a particular clause directing, that in case any of the said children shall die before they attain their ages, or are married, the portion or share of such children so dying shall go or accrue to the surviving or other children, there such shares of those children who so die under age will not go or survive (as the expression is) to or among the surviving children, but the same shall sink into the land; that is, the land or real estate will be discharged from the raising the same; and this is in order to preserve the landed estate as entire as possible for the benefit of the heir, as will be said under the next head: for,

FOURTHLY, If a portion is so directed to be raised out of land by a deed or will for the benefit of a younger child, son or daughter, to be paid at a particular age, as at the age of twenty-one, or at the age of seventeen or eighteen, or on the day of marriage; there, if such child dies in its tender years, that portion shall not be raised for the benefit of its next of kin, or for the administrators of such child, but shall sink for the benefit of the heir of the family; "for as the donor or testator meant only to load his family estate with a provision for such younger child in case he should want it, and such younger child dying before he came to that age in which he was supposed to have occasion for a provision for his future livelihood; there could not be within the meaning of such donor or testator any need to burthen the estate therewith:" and therefore to burthen landed estates in families the rule of equity is, that such provisions or por-

tions shall sink, and that the land shall be discharged from raising the same. This is also the reason why the shares of such portions as are mentioned under the lasthead shall not go over or survive to the surviving children, unless there is a particular clause expressly directing the same to do in case of the death of any child in their tender years as aforesaid.

FIFTHLY, Although in the case of an actual settlement made before or after marriage, where clauses of survivorship with respect to the shares of the younger children who die before they attain the days of payment accruing or surviving over to the survivors are omitted, a court of equity will not supply the omission; yet where there happens to be no more than short articles previous to a marriage, whereby it is agreed that such and such lands shall, by some future act, be settled upon the husband and wife for their lives, with remainder to their first and other sons successively in tail male, subject to a term of years or a charge for the raising of particular sums for portions or provisions for younger children, there, if the parties come to a court of equity for directions how to make the settlement, the court will, as I apprehend, supply the omission, and direct a clause of survivorship to be inserted, directing "that the shares of any of the children who die under age, or unmarried, shall survive to and among the survivors," as well as they would (if such a clause was omitted) supply the want of one directing the trustees to raise maintenance for such children during their minorities. This at least is my private opinion; the ground of which is, that as it is usual and customary to insert all such clauses, and as articles are only meant to serve as heads or instructions to counsel how to frame the settlement afterwards in a formal manner, the court ought to direct such a settlement to be made as is most conformable to the approved and known method of practice among persons conversant in business.

I WILL now consider the particular circumstances of this case. The act of parliament here stated, after taking notice (among other things), that it was agreed by the articles that lands were to be purchased with the 60,000*l*. which was to be paid by earl Cadogan, says, in the recital, that the younger son and the five daughters of the late duke and duchess were severally seised of and intitled to the lands purchased, and to be purchased, with the said 60,000*l*. as tenants in common, to them and the heirs of their bodies respectively, with cross-remainders of their respective shares, in case of any of their deaths without issue, to the survivors of them, with other remainders over. This is mere matter of recital; and nothing is said, so far as is stated here, in any of the enacting clauses of the act so much as tending to shew that it was the intention of parliament that such construction, with respect to any cross-remainders, should be binding upon, or be admitted on all future occasions by the parties. If there was any agreement between his grace the duke of Richmond on the one part, and the noble persons who were the husbands of his grace's married sisters and the guardians of his grace's infant sisters on the other part, that that construction should be admitted by all the parties, his grace no doubt will be bound by that agreement, and will perform it with all honour; but otherwise I shall impose too difficult a task on myself to say, that this recital is binding upon his grace. The sense of parliament is certainly a great authority; but the recitals in private acts of parliament are often penned by mere agents: and though such acts are generally revised with great care by the Judges, yet in family matters, where all parties are consenting to what is prayed from parliament, one may, without failing in point of candour, very naturally suppose that such abstruse points as what words or sentences would or would not create cross-remainders in articles or settlements were not attended to by the Judges on this occasion,

Lays the act out
of the case—goes
to the words,

sion, especially, since it was by no means necessary for the parliament to bind the parties to admit of that construction, for the purpose of making what the parliament was to ordain by that act the more effectual; and that was, “That if any of the unmarried daughters therein mentioned should attain the ages therein expressed, or be married, they should have 10,000*l.* a-piece in lieu of their respective shares in the lands to be purchased with the 60,000*l.*” The act of parliament was obtained for this, and for this only; I am therefore obliged for the present to lay the recital in the act of parliament out of the case, and to go back to the words of the articles themselves, directing how the lands to be purchased with the 60,000*l.* should be settled; which words are thus: “After the decease of the said thert earl of March and his intended lady, to the use of all and every the children of the said earl of March, to be begotten on the body of the said lady Sarah (the eldest, in case there should be any, always excepted), equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, and to their several and respective heirs of their respective bodies issuing; and for want of such issue, to the use of such eldest son and the heirs of his body; remainder to the said earl Cadogan, his heirs and assigns for ever.” And I think it a very difficult point to determine, whether a court of equity would or would not have directed such cross-remainders as are mentioned in the act of parliament to be inserted in the settlement, had there been a suit instituted in a court of equity for directions how to make such settlement, . . .

I HAVE proposed in this paper only to offer such hints as seem proper to be attended to for the solution of the difficulties in this case; and it seeming necessary to me to take into consideration here what words will or will not create cross-remainders, either under settlements or wills in courts of law, or under articles in courts of equity, I

will

will state such distinctions as seem to me to have prevailed in those cases, so far as any such now occur to me.

FIRST, The limiting of cross-remainders after a tenancy in common in a settlement to uses in legal terms, requires a long form of words something to this effect: "That in case there shall be a failure of issue of the body of any of the before-mentioned persons who are so made tenants in common, then as to the part and share of the person or persons whose issue shall so fail, that the premises shall go and remain to the use of the survivors and survivor, and others of them, and the heirs of his and their body and bodies respectively; and for want of such issue of all such persons, that then the premises shall remain over to some third person, &c." This is a clear and express limitation of cross-remainders in a deed.

Words necessary to create a limitation of a cross-remainder in a deed after a tenancy in common.

SECONDLY, But in a will if lands are devised to two or more persons, and to the heirs or issue of their bodies as tenants in common severally and respectively, and then the testator says, "and for default of issue of both of the said persons, or of all of them, that then the said premises shall go to a third person," the law, that tries to follow the intention of the parties, will collect, that as the testator did not direct that the lands should go over to a third person till there was a total failure of issue of both or of all of the preceding tenants in common, he meant that in case of the death and failure of issue of one of them, the share in the lands of him so dying and failing of issue should go over to the other tenant in common, and to the heirs or issue of his body, before the third person should have any actual title to that share; and therefore the law says, "that if these words, in default of issue of both or all of them the said tenants in common, shall create a cross-remainder in tail to each of the said tenants in common in their respective shares by implication;" and therefore the Judges construe such words to operate so as to interpose a remainder in tail in each of the said shares to each of the said tenants

In a will,

tenants

CASE ON THE CONSTRUCTION OF

tenants in common, between the limitations in tail to them severally of their own original shares, and the subsequent limitation of the entirety to the third person.

THIRDLY, But if there are no words in a will of this kind to shew that the testator really meant not to let in the third person or devisee until there was a total failure of issue of the before-mentioned devisees, so by him before made tenants in common in tail, there the third person or remainder-man will be let in upon the death and failure of issue of each tenant in common to the part and share of that tenant in common immediately: as if there is a devise to two men and the heirs of their bodies equally to be divided between them as tenants in common, and for default of such issue, or for want of such issue, or in failure of such issue, to *T. S.* and his heirs; there, if one of the two men dies without issue, *T. S.* shall immediately have his share; for that the words, "in default of such issue," &c. will not of themselves create cross-remainders by implication, their natural meaning being to carry over the several shares of the persons so dying respectively without issue to the last remainder-man, as and when such persons respectively die without issue,

FOURTHLY, Yet in some cases courts of equity will construe marriage articles still more liberally. If *A.* and *B.* agree that the son of *A.* shall marry the daughter of *B.* and they two enter into articles whereby *A.* agrees to pay 20,000*l.* and *B.* agrees to pay 10,000*l.* both to be deposited in the hands of trustees, to be laid out in a purchase of lands to be settled to the use of the intended husband and wife for their lives and the life of the survivor, with remainder to the issue of the marriage; and in default of such issue, that the reversion in fee shall go as to two thirds to *A.* and as to the other third to *B.* in fee; there a court of equity will direct that the lands shall be settled so as to go, after the death of the husband and wife, to the first and other sons of the marriage successively in tail,

MARRIAGE ARTICLES AND CROSS REMAINDERS.

tail, with remainder to all the daughters as tenants in common in tail, with a cross-remainder in tail between them all, before the limitation to *A.* and *B.* in fee shall be let in. The reason given for this construction is, that articles previous to a marriage are but as heads or minutes of the agreement of the parties, and that they are only instructions to counsel how to put the future settlement into a formal dress; that as such words are actual minutes for counsel, and would contain sufficient as hints to counsel how to draw the settlement, a court of equity ought to follow the common form.

THIS was part of the Case of Hanbury and Price in the time of lord chancellor King; and I think, that if the words of the articles in the foregoing Case had been to settle the lands on the first and other sons successively in tail, and then upon all the daughters as tenants in common, and the heirs of their bodies, and in default of such issue, &c. to *A.* and *B.* in the proportions aforesaid in fee, there a court of equity would have directed cross-remainders among the daughters; but not from any particular operation in construction of the words "in default of such issue," but from other principles of equity formed upon the intention of the parties, who, in prospect of future marriage, had it in view to make provision for the establishment of a family; which was, to have landed property that was to be secured in a course of succession to all the descendants of that family. From all these considerations here will be points and questions of great difficulty.

FIRST, It will be a question how far the recital in the act of parliament shall be binding or not binding. I must be permitted to say, that nothing has hitherto appeared to me to shew, that it was intended by the parties that the construction put upon the articles by that recital was intended to be admitted in the course of such future rights as should accrue to any of those parties under the said

Hanbury and
Price, 1729

How far the re-
cital binding.

said articles; but I have not seen any actual copy of the said act of parliament.

SECONDLY, If the recital in the act of parliament is to be laid out of the case, then the present rights either of lady Cecilia's sisters and brother to her portion of 10,000*l.* or of his grace the present duke of Richmond to that sum, must, as I conceive, be derived from and governed by the words of the articles, and the intent of the parties thereto; and then it will be a question of very great difficulty, Whether, in case the 60,000*l.* mentioned in the articles had been laid out in the purchase of lands, and the shares of those lands had been limited to all the younger children of the late duke and duchess as tenants in common in tail, there ought in that case to have been limitations in nature of cross-remainders of their several shares among them in tail, before the introduction of the subsequent remainder in tail to his grace the present duke of Richmond? Were the very words of these articles to be transcribed into a will, I should think clearly that there would be no cross-remainders by implication between or among these younger children. The words severally and respectively point only to the several estates which the several tenants in common were to take in their respective shares, so as to shew that each younger child, and the heirs of his or her body, was to take his or her share as tenant in tail separately and apart, and as a distinct sort of property from the shares of their brothers or sisters; but those words severally and respectively can have no influence upon the question, Whether there shall be cross-remainders by implication, or not? so that the question will rest entirely upon the words *in default of such issue*. And I know of no case where these words alone have been construed to create cross-remainders by implication. All the Cases of Holmes and Maynell, Lomax and Holmden, Coomber and Hill, Davenport and Oldys, &c. prove that the words *in default of such issue* in a will, or the like,

will not of themselves create cross-remainders by implication: but these words stand not in a will, but in that part of marriage articles which makes a provision for the support and livelihood, by way of portions, of younger children. This is very different from those parts of marriage articles which direct in what course of succession that which is intended to be the family estate shall go to or amongst the descendants and representatives of the intended family; so that I think the Case of Hanbury and Price, which I have mentioned above in the third head of observations upon cross-remainders by implication, will not govern very much in the present case. It is a pretty strong circumstance in favour of cross-remainders among the children, that if there had been but one younger child, son or daughter, that younger child would have had an estate tail in all the lands that were to be purchased with the 60,000l.; but still this may perhaps be accounted for another way: Why might it not be the intention of the parties to the articles, that if there was but one younger child, son or daughter, that child should have the entirety of the whole land to be purchased with the 60,000l. to him or herself in tail, to assist in establishing a new family; yet if there should be more younger children than one, that each such younger child should have a separate share to him or herself in tail, as a provision for his or her competent livelihood; but that the benefit of each such particular share, on the death and failure of issue of any one child, should go directly to the eldest son, by way of augmenting his landed estate. Whether this is sufficient to counterbalance the weight of that argument which arises from the consideration of what was the intention of the parties in the event of there being but one younger child, deserves to be well considered.

I submit these thoughts to the parties, who seem to me to stand upon very debateable ground on the one part as much as on the other. I have as yet formed no Opinion; and

and for the present I decline even the saying whether I incline or not to either side.

*Lincoln's-Inn,
21st Jan. 1771.*

JA. BOOTH.

MR. PATTER-
SON'S OPI-
NION.

WHEN a learned Judge has impartially stated the evidence and arguments on both sides, it is the business of a jury, (though men of much inferior knowledge) to determine, be the question ever so difficult or doubtful.

As a jurymen, therefore, I presume to decide in the Case referred to me only because I must, but with all due deference to the judgment of my very learned friend.

THE Case shortly stated is,

THAT on the marriage of lord and lady March (their eldest son being amply provided for), lord Cadogan by articles covenanted to lay out 60,000l. in the purchase of lands to be settled to lord Cadogan for life; then to lord March, for the joint lives of himself and wife; then, if the lady survived, and there was no child of the marriage, to lord Cadogan in fee; but if she survived and there were children, then, as to half, to lady March for life, and as to the other half during her life, and as to the whole after her death, to the use of the children (except the eldest son), in such shares as lord March and his lady should appoint, so as no child should have less than the value of 10,000l.; and in case of no appointment, then to all the children (the eldest son always excepted), equally to be divided amongst them as tenants in common, and the several and respective heirs of their respective bodies; and for want of such issue, then to the eldest son, and the heirs of his body; and for want of such issue, to lord Cadogan in fee.

LORD and lady March left an eldest son and six younger children, one of whom is since dead and unmarried; upon which the question arises, Whether that child's share of
the

the 60,000*l.* should go to the eldest son, or survive to the younger children?

IN considering this question I lay it down, that courts of equity look upon articles only as short minutes or instructions to prepare the settlement in more ample form; and therefore, on a bill for carrying the same into execution, will decree the settlement to be drawn agreeable to what they conceive to have been the intention of the parties, and for that purpose to insert such limitations as will effectuate that intention, although not expressly directed by the articles.

THUS, where portions are directed to be paid to younger children at certain ages without mention of maintenance in the mean time, equity will supply the omission.

THUS, also (in the case now under consideration) equity would undoubtedly in the settlement supply trustees to preserve contingent remainders, though not mentioned in the articles.

AND thus, where by the tenor of the articles it appears that an estate intailed upon several children as tenants in common, was not intended to go to a third person until all those children and their issue should be extinct, equity will decree cross-remainders, although not directed by the articles.

IN the present Case, therefore, let us consider what the parties meant by the words *such issue*, on the failure of which the estate was to go to the eldest son.

THE word *such* being a word of reference, naturally, and by the common construction, applies to the next antecedent description, which in this case is *the several and respective heirs of the respective bodies of all and every the younger children*. If therefore the description referred to was substituted instead of the word *such*, the limitation to the eldest son was to take place upon the failure of the several and respective heirs of the bodies of all and every the said younger children; from whence I conclude, that

the intention of the parties was to restrain that limitation till there should be none of the issue of any of the children left.

AND what tends to confirm me in this opinion is,

FIRST, That the primary object of the articles was evidently to provide for the younger children, inasmuch that in case of an appointment by the father and mother, it is provided that the eldest son should be always excluded; and therefore any doubtful expression ought to be construed most favourably for them.

SECONDLY, That in case of an appointment, no child's share was to be less than the value of 10,000*l.*; and so far were the parties from thinking the share of any deceased child too great an addition to the shares of the surviving younger children, that if there had happened to be but one younger child, such child was to have been intitled to the whole estate.

THIRDLY, That to understand by the words *such issue* the issue of any one or more of the younger children, seemed forced and unnatural, and no ways justified by any rule of construction.

FOURTHLY, That this case differs from those where the bulk of the estate appears to be intended for the eldest son, but burthened with portions for younger children; in which latter instances the deed ought to be most favourably construed for the heir, and nothing taken from him but what is expressly directed; whereas, in the present Case, the whole is intended for the younger children, and a limitation made to the eldest son merely to prevent the estate returning to the donor.

FIFTHLY, That my construction of the words *such issue* receives additional strength from the recital in the act of parliament, which is not pretended to be a recital of the words of the articles, and consequently cannot be deemed a misrecital, but must be deemed as a legislative decision with regard to the operation of the words *such issue*, and consequently

consequently an authoritative declaration of the intention of the parties.

If therefore I am right in my construction, and the parties may be understood to have meant that the eldest son should not succeed till the extinction of all the younger children and their issue, it follows, upon the principles above stated, that a court of equity would in this case decree the settlement with cross-remainders amongst them previous to the limitation to the eldest son.

BUT I submit my opinion to the learned; happy if any of my ideas may serve as hints to call their attention to a further discussion of a point which one of them has pronounced doubtful.

PRICE *and* ALLEN.

IT was argued for the plaintiffs, that in the construction of marriage articles the court of chancery doth not so much endeavour to discover what has been done, as to investigate the true sense of those articles, and from them draw what still remains to be done for completing the intent of the parties.

This cause was heard before lord chancellor APLEY, in Easter Term 1773.

THIS court prunes excrescences, amends deficiencies, and carries into execution the scope and purport of the articles.

IN the Case of HANBURY and PRICE lord King did not consider the bare words, but paid regard to the intent of the parties and tenor of the articles.

WEST and ERISSEY is in point. Twilden and Locke is similar; where the words were, "to all the children male and female as tenants in common, and not as joint tenants, and the heirs of their respective bodies, and for want of such issue, remainder over."

LORD CADOGAN had one general view; which was, to provide for all the younger children of the marriage and their issue, and that in the most liberal manner.

HE gave a power of appointment to the father and mother, but gave it in such a manner as to secure an ample fortune to each child, by naming a specific sum as far as the situation of the family allowed; but in default of, or if after such appointment made, any part of the 60,000*l.* remained undisposed of, To whom was it to go, and how? To all the children equally; nor could the father and mother have deprived an only younger child of a shilling of the money. It is therefore clear, that, the younger children of the marriage were the sole objects of the parties, and the only persons intended to be benefited under the articles, which intent he hoped would be the decretal guide.

FOR defendants it was argued, that this money is still to be considered as land; that the act of parliament had not intended to make any alteration in the general meaning and purport of the articles.

THAT the recital in the act of parliament giving cross-remainders between the children was of no weight, neither adding to nor diminishing the right of the parties, for nothing is consequential from such recitals in acts of parliament.

IT is not contained in the petition to the house, nor did the noble duke or any of the parties intend that any thing contained in that act should in anywise affect, alter, or change, the intent or construction of those articles.

LORD CHANCELLOR observed, that where recitals in acts of parliament relate to matters of fact, they may be controverted, and they that prove not to be so are of no authority; but when they relate to matters of law they are narrowly inspected by the judges, who will not set their hands to what doth not appear to them to be law. The two judges, chief baron Parker and baron Adams, have set their hands to this bill and report; and therefore a recital of a point of law will have more weight, because

the judges will not let it pass unexamined. *Vide* page 373, at the N. B.

THE Case of marriage articles differs totally from wills and settlements.

WR. WEDDER-
BURN, solicitor-general,
reply.

THEY are only short minutes for conveyancers, to guide them in modelling the deed in contemplation, and are never intended for an absolute settlement.

THEY contain no legal interest, nor do they create any limitations of estates to the several persons intended to take under them.

THEY only found a right in equity, and are no more than memorandums for ascertaining the intent of the parties, to be carried into execution under a more formal conveyance, being in themselves no conveyance of estates.

IT follows therefore of course, that the particular of technical words made use of in marriage articles are of no signification, any more than as they serve to convey the general intent of the parties.

NOR is the court embarrassed with the technical sense of words of limitations made use of in them.

NOR doth the hitherto-laid-down doctrine, that cross-remainders cannot exist between more than two, affect the construction of them; no such principle having ever yet been laid down in the case of marriage articles.

THE words "want of such issue" here must not be said to refer to the issue of the children of lord March and lady Sarah Cadogan only, but to those children and their issue.

NOR can establishing cross-remainders here be said to be to the disinherison of the heir at law; for if the duke of Richmond can take the whole or any part of this 60,000*l.* he takes it under a settlement; but if the same is to be considered as land, lord Cadogan is the settler, and his heir at law would be the person to inherit that if the settlement did not intervene.

THE same might have happened in this noble family which happened in one of distinguished consequence in this country.

QUEEN ANNE had ten children; all but one were born alive; every one, except the duke of Gloucester, died within the week after their birth; but yet each of them would have taken a vested interest under the articles. Supposing then five of the younger children had, in our Case, died under one year old, and one only survived, Would this court have decreed him to have one sixth share only of the 60,000*l.*? which they must have done upon the principle contended for on the other side; for each infant would by his birth have gained a vested interest, which of course would, to the prejudice of the survivor, have become an inheritable estate to the general heir of the marriage under the articles. Upon this ground, if there had been eight younger children, or more, the share of the only living child would have been reduced to a smaller sum; yet it is expressly directed by the parties that each child shall, if circumstances will allow it, have 10,000*l.* but it was not intended to abridge any part of that portion for the benefit of the eldest son, when it is expressed that an only younger child would have taken the whole.

It cannot be concluded, that lord Cadogan had in contemplation to give any part of this to the ultimate taker in remainder, lady Margaret Bentinck, his youngest daughter, whilst there were any children or issue remaining of his eldest daughter lady March; yet upon the construction contended for she may inherit this present share now claimed by the defendant, upon the event of his dying without suffering a recovery,

I THEREFORE lay it down as a general principle, that in construction of articles of this nature, a right of survivorship exists in the case of money, and in case of a landed property

property that cross-remainders would be established between the parties.

THE act of parliament has left matters just where they were.

I SUBMIT—that in the present Case the court will, contrary to the legal import of the articles upon the general intent of the parties, constitute cross-remainders.

N. B. IT was much for defendants that cross-remainders could not exist between more than two by implication; that the rule, however absurd in its commencement, had been strongly laid down by judge Dodridge, and recognized in the Case of _____ by lord Hardwicke, which warranted the foundation of another decree by lord Hardwicke.

ON the 4th May 1773, lord chancellor Apsley gave his decree in this cause.

HAVING stated the recognizance entered into by lord Cadogan, the limitations in the articles, the state of the family, and the bill applying to the court of chancery to direct the money to be laid out, the general decree given for that purpose, the marriage of lady Caroline Lenox with mr. Fox, &c. and the proposal made by the duke to mr. Fox, &c. to purchase the estate, and to secure 10,000l. to each of his younger brothers and sisters as before mentioned, the reference for that purpose to the master, and his report of the proposal, in consequence of which the younger children petitioned parliament to have such proposal carried into execution, he proceeded, That the enacting clause in the act confirmed the agreement, and directed that the duke should be allowed to purchase the estate in question, and take the residue of the money in the funds, consisting of bank annuities, upon paying the portions therein directed to be paid, and securing, as therein is directed, 10,000l. a piece to each of the younger children, whose portion still remained unpaid, and who were under age.

HE then proceeded and observed, that the act had made no alteration in the limitations of the articles, but seems to have had in view to confirm them totally.

IT is mentioned in the recital, that the younger children are intitled as tenants in common to estates tail, with cross-remainders in case of the death of one or more of them. But though this recital is inserted in the act, yet there is no notice taken of it in the enacting part, which is quite silent as to that question.

IT has been argued on the part of the plaintiffs, that the duke of Richmond is bound by this recital. If it had been enacted that cross-remainders were limited between the younger children, though founded upon a misrecital, yet it would have been conclusive against the duke of Richmond, and cross-remainders clearly have been established; though generally recitals in private acts of parliament, or in deeds, are not binding to the parties, nor, as this recital is, has it at all affected the present case; therefore the question is fairly open for the duke to contend, that there were no cross-remainders established under the articles between the younger children, and that as his sister lady Cecilia Margareta died under age and unmarried, he, as next remainder-man, is intitled to her share of the 60,000*l*.

BUT this recital, though not conclusive, will have some weight; for it shews that the persons who prepared and passed the act looked upon the articles in that light; which the court will pay a regard to, though it may not be of opinion that such recitals shall constantly bind.

THIS court will always consider articles as preparing something afterwards to be completed, and it is the constant rule to look upon them as merely the heads of the points agreed upon between the parties, and as minutes drawn by them to lay before counsel, in order to direct and guide them to carry the intent and scheme of the parties into complete execution; and when application is made to this court

court for that purpose, the court will mould them in such manner as to comprehend what appears to be the manifest intent and design of the parties, not paying a nice adherence to the legal sense or operation of the words which may be made use of in framing the articles. It would be endless to go through all the Cases where this court has interposed, and directed articles made previous to settlements on marriage to be carried into execution directly different from the technical bare sense of words. The Case of Trevor and Trevor, in 1. P. Will. is strong, where the articles were construed directly contrary to the technical sense of the words.

HE stated this carefully, and then quoted *King v. Kingsford* on 2d July 1743 before lord Hardwicke, which he stated at large also; and cited West and Erissley, 2. P. Will. 349, at large, to shew how far this court will go in directing the execution of articles made previous to the marriages.

NOR can I find any instance where this court has, upon the construction of articles made previous to marriage, directed a limitation to daughters generally in such articles to be carried into execution without directing cross-remainders to be drawn between the daughters.

THE Case of Hanbury and Price shews plainly that was the constant practice of my lord Hardwicke; for in that Case the remainder was to the issue of the marriage generally. But he directed estates tail to be given to the first, &c. sons, with remainder to all the daughters of the marriage, to take as tenants in common, and not as joint tenants, and the heirs of their respective bodies, with cross-remainders in tail.

THE words of the articles in this present Case are general and clear, that the parties meant the limitations in the common course of settlement, and the common course in such cases is to establish cross-remainders.

I BELIEVE there is no instance where cross-remainders upon articles have not been directed, when application has been made to this court for carrying articles into execution.

IN all the Cases I can find they have been uniformly granted.

HERE the intent of the parties is most clear upon the face of the articles, (*viz.*) that the eldest son should never take any benefit in this 60,000*l.* while there were any younger children or issue of the younger children to take. This portion of the young lady is to be laid out in land.

HE then stated the limitations of the articles. It is plain the intent of lord Cadogan was, that the land should not revert to him if there were any children of the marriage to take it; and in that light this 60,000*l.* stands just upon the same grounds with the 20,000*l.* limited to younger children by a former part of the articles, which it is most clear he never was intended to be benefited by any part of, unless in the event of a total failure of children of the marriage.

HE then stated the limitations in the articles, omitting that part of them under the *videlicet* (observing that ought to be read in a parenthesis), and compared it to the limitation in regard to the 20,000*l.* with which he observed it corresponded exactly; arguing from thence, that what was inserted in the parenthesis ought to be read by itself, and did make up a distinct sentence of itself: then, having read it, he proceeded to say, the construction to be put upon it was plain and obvious, that as long as a younger child or children existed the eldest son could take no part of the 60,000*l.*

IF the construction contended for on behalf of the duke of Richmond is to be established, lord Cadogan might have come into a great share of the 60,000*l.*; for supposing there had only been three daughters, younger children

children of the marriage, and that two of them had died infants and unmarried, their share being vested must have gone to the duke; in case of whose death without suffering a recovery, two thirds of this sum would have went back to lord Cadogan, against the express intent of parties. But if the words are so plain as to require this construction, the parties must submit; and it is insisted for the duke that the words of the *videlicet* are so plain in his favour, that this court cannot go against the technical sense of them.

BUT I find no such rule, nor such Case; but that the contrary is established is true, and this court will always give such words in marriage articles that interpretation which seems best to concur with the general sense of the parties directing the drawing of such articles, however the legal technical expressions may seem to militate against that constructive sense.

IN the Case cited from Vesey, lord Hardwicke laid it down very fully upon this ground.

IT is said that must have been the sense of the duke of Richmond and the parties at the time.

BUT I think the contrary is evident; and upon search I can find no Case wherever such an intent was given to the parties by this court in the case of marriage articles, but all run upon wills.

HE then cited the Case of Coomber and Hill, 2. Strange 969. to shew, that these words are not necessarily such technical words as of course to be construed to defeat a possibility of cross-remainders, as is contended for by the duke of Richmond; and dwelt much upon the distinction made use of by lord Hardwicke between express intention and necessary implication. He then cited Williams and Brown, 8. Geo. 2. which is said to have been determined on the principles of the Case of Coomber and Hill.

Mr. Ford has a good note of this Case.

I HAVE a note of the Case, and, though a young note-taker,

taker, find it corresponds with serjeant Barnardiston's note.

NEXT comes Davenport and Oldys, where I find the word *heirs* in lord Hardwicke's note instead of *issue*, as mentioned by Atkins, vol. i. 579.

LORD HARDWICKE, decreeing in this Case, cited only the Case of Coomber and Hill, but did not quote it as the grounds of his decree.

THESE are the three Cases cited by the duke's counsel on his part, and are said to be decisive in his favour; but upon sifting them, I am very clear lord Hardwicke did not consider them so clear in point of the technical sense, as not to be liable to have been construed otherwise, if the sense of the parties had appeared different.

IT has been said, that there is no difference in the manner of construing wills and articles; but the mode of construction is very different, as appears very plain from the Case of Bate and Coleman, 1. P. Will. 142. where lord Harcourt expressly takes notice of the difference between a will and articles; and lord Hardwicke recognizes that difference very strongly in the Case of West and Erissey; articles being always looked upon as mere minutes or heads to direct the counsel how to convey distinctly the several beneficial interests and estates to the several persons intended to be benefited, according to the whole intention of the parties, appearing from the general construction of the whole scheme of the articles collected and compared together.

Now, in my opinion, it is evident, from the whole scope of the articles taken at one view, that it was certainly the intent of the parties that lord Cadogan should take no part of this 60,000l. unless there was no issue of the marriage; and it is equally plain the eldest son was never intended to be benefited, or to take any thing whilst there were any younger children capable of taking under that description. But if the sense given the articles by the defendant

defendant is to stand, the respective share of any younger child dying an infant and unmarried being vested, would have gone over to the present defendant, the duke of Richmond, during the existence of the present younger children of the marriage; from which circumstance the construction contended for on the part of the duke appears to be entirely contrary to the spirit of the articles taken collectively and together.

THE recital, as I observed before, has some weight; it contributes therefore to strengthen me in this opinion; and though I do not absolutely think the duke is bound by it, yet I cannot help laying some stress upon it, being thoroughly convinced that the two learned judges who passed the act maturely considered the scope of the articles; and it was manifestly their opinion, that that construction which I have laid down was the true construction to be given to the articles.

Lord chief baron PARKER and baron ADAMS.

IF the point was not clear, it was at least their opinion. If true, they had not heard the matter argued by counsel; but no doubt they settled the act with proper attention; therefore it has its weight.

THEY are both great men, and well versed in the practice of a court of equity: I am satisfied with their opinion, and they permitted cross-remainders to be inserted.

AND I collect the sense of the articles from the spirit of the whole, from which it is as plain as possible the eldest child was never intended to take any share of the 60,000*l.* so long as there remained a younger child in being to take, under the express words of the articles themselves; for if there had been one younger child only, that child was to have taken the whole.

THE possibility of the greatest part of the money going to lord Cadogan, which I mentioned before, and the clear direct intent of the articles that that event should never happen while there was any issue of the marriage, corroborates

CASE ON THE CONSTRUCTION, &c.

borates me in this opinion, and seems to me conclusive in favour of that sense which I have given to the articles.

“ THEREFORE let it be decreed, That the duke pay the 10,000*l.* amongst the younger children, *viz.* 2000*l.* a-piece, with accruing interest at 4*l.* *per-cent.* from the death of lady Cecilia.

“ LET the costs be paid out of the 10,000*l.* as between client and solicitor, and the residue equally as before.”

A DOUBT was stated as to lady Sarah Bunbury's share, she being under articles of separation from her husband.

BUT the chancellor observed, That made no difference, her husband being nevertheless intitled to receive what personal estate came to her. In her case perhaps some agreement is made to the contrary.

WIDDER-
BURN.

THE strict way in these cases is, to order the money to be paid into this court till the master makes his report whether the settlements made on the respective marriages of the ladies intitled is adequate; because, if not, a further provision may be made for them from the sum to be paid in.

Chancellor.

BUT perhaps it is not necessary in this case.

Solicitor general.

IT had better be done in the usual way.

Lord chancellor.

THEN be it so.

Vide Staples v. Maurice, Dom. P. 1774.

No XIII.

*The RULES of CUSTOMES pertaining unto WEST-
SHEEN, PETERSHAM, and HAM *.*

THE rule of customes made the first day of May in the fourth year of the reign of King Edward the fourth, which customes were granted heretofore by the King and Kings unto the tenants belonging unto the Lordships of Westsheen, Peter sham, and Ham; which we the tenants do hold our land by the said customes, &c. MANORS, granted by the King and Kings, time out of mind, as hereafter followeth, viz.

I. **IMPRIMIS**, it was granted to our customes, that we should have a court yearly, at the will of the lord; and that all the tenants thereto belonging shall thither resort upon a fortnights warning, by a precept made by the steward directed to the bailiff, and he to give warning, against the day; and those that come not at the said day so warned by the bailiff, shall forfeit the first court two-pence, the second four-pence, the third court six-pence, and so double every court his forfeit.

II. **THE** second part of our custom is, that when the steward and the lord with the Kings tenants be assembled in the face of the court then called together by name and sworn, that then the said homage shall enquire, whether that any of the Kings tenants be deceased, and to present his name and next heir, or whether he died seised or not.

III. **THE** third part of our custom is, that if any tenant do die so seised, that he dieing so seised, then that which descended ought of right to descend by custom of our Manor to the youngest son and his heirs, and if he have no

* The present article is here printed from a copy taken from a record remaining in the Tower.

son, to the youngest daughter and her heirs; and if she die without issue, to remain to the next of his kin; and if there can none of the kin be found, then to make claim to the lord, that then the lord shall by our custom seize it into his hands as escheat for lack of heirs general; and then the lord of his special grace may grant seisure to whom he listeth, upon a new fine levied to them and their heirs for ever.

IV. THE fourth part of our custom is, if the said tenant do die without issue, and also seised, having a wife which surviveth him, and if the said wife do come into the said court and make claim unto the lands after the decease of her husband, then she might have by our custom of the heir, the third part of the rent during her life; and if there be no heir to be found, then she is to have it of the lord.

V. THE fifth part of our custom is, that if any tenant will deliver a surrender before his death unto the use of his wife, or to his heirs, that then he must deliver it up into the hands of two of the Kings tenants of the said lordship; and if he deliver it but to one, that stands void and of none effect, except it be in the extremity of death: and further, when the said tenants have received it to the use of their wives or their heirs, whom they list to make it unto, the said tenants shall bring in the said surrender at the next court holden after the date thereof, or else the said surrender to be void and of none effect.

VI. THE sixth part of our custom is, that we hold our lands by the rod, or copy of court roll, by custom of our manor at the will of the lord; and that we may lop, top, fell by the ground, wood and timber, and carry it away without any forfeit making of lands and houses, so that we do keep the houses in sufficient reparations; and if we do not keep the reparations, then shall the lord seize it into his hands, and take the profits thereof unto his own use, untill such time as we have sufficiently repaired them, then

then to fine with the Lord and so to have our lands again, without any interruption on any part made by the Lord or his assigns after that we have payed our fine.

VII. THE seventh part of our custom is, if any tenant that holdeth land of our sovereign Lord the King do sue it out of the said court without licence of the Lord of the soyle, he to forfeit all his copyhold which he hath lying within the Lordship, except it be brought by the commandment of the King or of his most honourable Counsell, and furthermore, whether he came to it by inheritance or purchase, and so holdeth it to him, his heirs, or assigns, and so at the time of his death to deliver a surrender unto his next heir, and if so be that after the death of any such tenant the heir doth give, set, or lay to mortgage, any copyhold lands lying within any of the Lordships, before the said heir be admitted tenant and hath paid his fine, according to the said customs of the manor of the said lordships, that then all such said surrender and mortgage made by the said heir shall stand clearly void and of none effect, by our customes.

VIII. THE eighth part of our custom is, that the Lord of the soil may lett, and sett, all manner of waste and void ground, by copy to any man that will take it, paying a fine to the Lord, and yearly quit rent to the King, for the Lord is bound to augment the Kings quit rent one year better than other by our custom, within any of the said three Lordships.

IX. THE ninth part of our custom is, that all our lands arable, and unarable, which lieth abroad in the common fields, is as common once a year, except certain closes, which lieth inclosure; and for all the common fields one tenant to enter common with another in all vacation times, but not betwixt our Lady day in Lent, and Michaelmas: and every man that holdeth of the Lord a telement of land shall common by our custom three sheep upon an acre,

that is to say, sixty-eight upon a tenement, and four oxen, three kine, two horses, one mare or gelding, and that no man which hath fold all his land from his house shall common for no more but his bare house, that is to say, three kine, one mare or horse, and no more no man shall keep by our custom.

X. THE tenth part of our custom is, that if any tenant holding lands of our sovereign Lord the King, within any of the Lordships, do cast down any parcel of freehold lying between two parcels of copyhold to the intent to make the copyhold land freehold, then the tenant so doing shall forfeit all his copyhold land lying and being within the said Lordships, by our customs.

XI. THE eleventh part of our custom is, that any tenant shall top wood, fell furze or thorns within the several Lordships portion and portion alike, and to carry home to their own houses for their own use; and that no man or woman keeping a common brew-house, or bake-house, sell no manner of wood, or furze, or thorns, to bake or brew withall, except he be a tenant in land, he shall have no more in the common than his tenure will give, according to our custom.

XII. THE twelveth part of our custom is, that the quit rent of the land belonging to the Lordship of Westsheen, is two-pence the acre, and six-pence the house without land, the fine of the said Lordship is two years quit rent. The quit rent of Peterham, and Ham, is four-pence the acre, and six-pence the house, and the fine is one years quit rent, every tenement is seven shillings and six-pence by our custom. And unto all these customs we the said tenants of the Lordship, we all do hold and affirm, by the grant of the King and Kings time out of mind.

AND for further assurance our heirs for ever that shall come after us, we have put it in writing for a continual remembrance.

remembrance, done before John Judgell, one of the Kings
honourable Counsell, and John Warman, then the Lord
of the soil for the time being. IN WITNESS whereof
John Hart, tenant, William Ballat, tenant, John Howe,
tenant, John Brewell, tenant, William Thorn, tenant.

*A most true Coppy from the Antient Original Coppy to be
produced on all great and necessary Occasions.*

No. XIV.

° ARGUMENTS *of the* LORD CHANCELLOR *, *and*
of the LORD CHIEF JUSTICE *of the* KING'S
 BENCH †, *in the* DOUGLAS CAUSE, *in the*
 HOUSE *of* LORDS, FEB. 27, 1769‡.

LORD CHANCELLOR.

THE Cause before us is, perhaps, the most solemn and important ever heard at this bar. For my own share I am unconnected with the parties; and having with all possible attention considered the matter both in public and private, I shall give my Opinion with that strictness of impartiality to which your lordships have so just and equitable a claim. The question before us is, “Is the appellant the son of the late lady Jane Douglas, or not?” I am of the mind that he is; and own that a more ample and positive proof of a child's being the son of a mother never appeared in a court of justice, or before any assize whatever.

THE marriage of lady Jane to colonel Stewart, August the 10th 1746, is admitted on all hands. Her pregnancy in January 1748, and the progress of it, were observed by many people: at Aix la Chapelle it was notorious; her stays were widened; the nuns of the convent of St. Anne's discerned it, notwithstanding lady Jane's modesty; the

* Lord Camden.

† Lord Mansfield.

‡ The following Arguments gave occasion to the production of a publication intitled, “Letters to Lord Mansfield;” in which the arguments in favour of the Appellant are very strongly controverted, and the conduct of the Guardians of the Duke of Hamilton, in bringing this memorable cause to an issue, is vindicated with great force and elegance.

maid servants are positive as to the fact; the earl of Crawford wrote an account of it to the duke of Douglas, not as an hearsay, but as a fact, of which he himself was fully satisfied by ocular inspection: and if there be a pregnancy, there must be a delivery; which accordingly happened by the positive evidence of Mrs. Hewitt, who has deposed, that "she received them into her lap as they came from lady Jane's body." She was delivered of twins on the 10th of July 1748, at Paris, in the house of madam a Brun, in the Fauxbourg de St. Germain. Lady Jane's ability to bear children is established by many witnesses; and a miscarriage after the birth of the twins, still more and more proves the delivery.

BUT, my lords, there is another proof no less convincing that the appellant is really the son of lady Jane, and this arises from the uniform tenderness shewn towards him. 'Tis in proof that on every occasion she shewed all the fondness of a mother: when he casually hit his head against a table, she screamed out and fainted away: when her husband, the colonel, was in prison, she never wrote to him without making mention of her sons: she recommends them to clergymen for the benefit of their prayers: is disconsolate for the death of the youngest: takes the Sacrament: owns her surviving son: does every thing in her power to convince the world of his being her's: blesses and acknowledges him in her dying moments, and leaves him such things as she had. Sir John likewise shews the same tenderness in effect; he leaves him 50,000 marks by a bond in September 1763, ten years after the death of lady Jane; and on his death-bed solemnly declares, before God, that the appellant is the son of lady Jane; "I make this declaration," said he, "as stepping into Eternity." A man that is a thief may disguise himself in public, but he has no occasion for any mask when in private by himself.

See p. 17,
Letter L.

THESE positive declarations convinced the duke of Douglas, and he left his dukedom and other estates to his nephew, the appellant, who was regularly served heir thereto in September 1761, when he was possessed of all the birth-right of a son, so far as the oaths of witnesses, the acknowledgment of parents, and an established habit and repute could go. The cruel aspersions thrown out against lady Jane and the colonel had been refuted by the late duke of Argyle and the countess of Stair². No mortal doubted the appellant's being the son of lady Jane, except Andrew Stuart; his father, Archibald Stuart; major Cockran, who is married to Stuart's sister; White of Stockbriggs, a principal actor in these scenes. These doubted the matter; and ———, as by concert, went over to France, not to procure evidence of a real fact, but to suborn witnesses to establish an article that never existed, except in their own imagination: the design was bad, and the means to accomplish it were no less criminal. 'Tis needless to follow the searcher through all the scenes of his enquiry; the result of which was to return to Scotland, enter an action against the appellant, and bring his own father to condemn him, at a time when the old gentleman was in a condition every way deplorable³. And taking advantage of his inaccuracies, he makes a second tour to Paris, where he published a *manifesto* entirely to seduce witnesses, and influence them to commit the blackest perjury. In this paper he describes the person of sir John Stewart, lady Jane Douglas, and of mrs. Hewitt; asserts that they had purchased two children, whom they wanted to impose upon the world in order to defraud a real heir of an immense estate and fortune; and inviting all who could give light into the matter to come to his lodgings, which he particularly described.

MR. STUART certainly appeared like the guardian of the duke of Hamilton; a pompous title, which drove several

² See p. 20. and
31.

³ See p. 33.

veral to their own destruction, and in hopes of a reward. Among the number of those was madam Mignon, a glass manufacturer's spouse; who, after conversing with Andrew Stuart and his clerk, and receiving presents from them, comes in before the *Tournelle Criminelle* and deposes, that she had sold her own child to foreigners whom she did not so much as know. "Can a woman forsake her sucking child?" is a rhetorical remonstrance handed to us from the highest authority. The thing is incredible, and yet the woman has sworn it!—a circumstance sufficient to render her testimony of no force when opposed to the dying declarations of lady Jane Douglas and colonel Stewart, and to the positive oath of mrs. Hewitt, whose character is established⁴ upon a very good foundation: but take the declaration of madam in all its extent, yet she has said nothing to affect the appellant; the time when, the people to whom, with every other circumstance, prove her not to have been the mother of the young gentleman; his complexion, the colour of his eyes and hair, prove that he was not her's. The same thing might be said of the son of Sanry the rope-dancer, whom the counsel for the respondent would infer to be the child Sholto, the younger of the twins; and, as a strong proof of the same, urged; the two were but the same identical person under different names; and your lordships were intreated to keep in your view the rupture under which each of them laboured in order to prove the identity! But how comes all out? Sanry's child could speak in November 1749, but Sholto could not utter a word for some months after he came to Mrs. Murray's house in December 1749. And now evidence is offered to be produced at your lordships' bar, that the child Sholto had no rupture in 1749; nay, that he was as sound as any person within these walls: certainly mr. Murray, the most material witness in this affair, is more to be credited than madam.

YOUR lordships have heard much ingenuity displayed in order to prove that lady Jane's pregnancy was imaginary; the symptoms are allowed, but the reality is now denied; though once Andrew Stuart himself was forced to acknowledge that lady Jane was actually with child. If lady Jane, or any other woman, had such symptoms, it is impossible she could have been eased of them so soon in any other manner as by a delivery; had she been ill of a dropsy, her bulk would not have been totally diminished in so short time as from the 2d of July to the first week in August; when all who saw her at Rheims concluded that she had but lately lain-in. Great stress has been laid upon the letters said to have been forged in the name of Pierre la Marre, the man midwife, the person who delivered lady Jane. I admit them to be forged, and yet this forgery is with me a proof of lady Jane's innocence. Sir John's hardships are admitted; and if he, after so long a confinement, should cause the letters that had passed between La Marre and himself to be transcribed, in order to amuse himself or to satisfy lady Jane that they were not lost, it was no way criminal. Lady Jane received them; but observing they were not originals, she laid them by: so conscious was she of her own innocence that she did not use them; nor ever would they have made their appearance had it not been for the conduct of Andrew Stuart, who, upon getting an order to search lady Jane's repositories, found out these letters, produced them in court to sir John, when under all the miserable circumstances of a man groaning under a load of years, infirmities, and the acutest pains.

THE evidence of Godfroi, the landlord of the *Hotel de Chalons*, in the *Rue St. Martin*, is contradictory and inconsistent, his books being every way defective and erroneous. Nor does Andrew Stuart appear in a favourable light in this particular: when first he came to Godfroi's house,

house, both the man and his wife were ignorant of the matter; neither the one nor the other recollected lady Jane Douglas or her husband, till Andrew Stuart, desiring a sight of the *Livre d'Inspecteur*, he found two articles, one of them *mr. Flurall, Escoissois, et sa famille sont entres 8me Juillet 1748*; and this he positively affirms, with oaths and imprecations, to be the hand-writing of sir John Stewart, with which he pretended to be thoroughly acquainted; but he was obliged to retract when other postages were found to be of the same hand-writing: this postage was found to be posterior to one written on the 12th, and the landlady of the house declared that she herself had marked it down. He had fifteen rooms and ten closets, which they pretended always to be full, and yet in their book it does not appear there was above three persons in them during colonel Stewart's abode; and what is pretty strange, they had many women-lodgers during that year, and yet they depose they remember none but this lady whom Andrew Stuart would have to be lady Jane Douglas. They even differ with respect to the names of their servants. The counsel at the bar have acknowledged the inaccuracy of the books, owing to the avocations of the man elsewhere, and to the inadvertency of his spouse, continually hurried by a multiplicity of business. Besides, a postage in a book such as the *Livre d'Inspecteur*, which, like a waste book, contains things just as they occur; or the *Livre d'Expense*, to which the articles of the former are transferred; bear no manner of convincing proof that the persons mentioned in these lived at such and such places, it being a customary thing to mark down the name of the person the moment he takes the lodging; and it is notorious that many persons have paid a week, nay a month's lodging, without sleeping a night in it; and this is no more than equity, since the same was reserved for their use.

BUT here, my lords, the pursuers in this affair have destroyed their own cause; they have brought a sort of proof

proof that lady Jane Douglas was at Michelle's house, called *Le Petit Hotel d'Anjou*, in the *Rue Serpente*, *Fauxbourg St. Germain*; and this at the very time when they would prove her to have been at the house of Godfroi, of whom so much has been said and heard. Michelle and Godfroi disagree in every thing except in the irregularity of their books; and indeed it is hard to say which of the two excels most in that particular. But not to insist on the irregularities, it is proved to be the practice in Paris, and of Michelle in particular, to write people's names in these police books as entered on the day the room was hired, though the person does not enter for some days after.

To insist on these things, my lords, is tedious; and yet the importance of the case requires it. One madam Blainville swears, that on one of the days between the 8th and 13th of July she accompanied lady Jane in a coach to take a view of Versailles, and at another time to see the *Palace de Vendome*; but this witness is in every respect contradicted by a multiplicity of evidence; and in every view her testimony appears to be absurd and preposterous. First, she is contradicted by mrs. Hewitt, whose deposition bears great weight with me, as also by other witnesses. For, first, she, Blainville, says, that sir John and his family were eight days in Michelle's before the child was brought to the house; whereas Michelle's family all swear that he was brought next day. Secondly, she says, that the child was given to the nurse La Favre the very night of his arrival; that she saw her carry him home with her, and that lady Jane visited him in the nurse's house; whereas, on the contrary, it is proved, that Favre remained four days at the hotel, during which period lady Jane went nowhere abroad. Thirdly, she deposes, that no person visited sir John and lady Jane during their stay at Michelle's; whereas, by the oath of madam Favre, a

gentle

gentleman visited him there : but be that as it may, lady Jane was delivered on the 10th of July ; and Blainville does not say she went to Versailles till the 27th ; and it is no new thing for a lady, however delicate, so long after delivery, to go so far in a country where the weather and roads are so remarkably fine, and the carriages every way easy and convenient.

ALL these objections to the reality of the appellant being the son of lady Jane are imaginary, and hitherto have been refuted, to the honour of the innocent, and the more firmly establishing him in the possession of his birthright. They only tend to render her virtues more brilliant and illustrious ; for as the allegations never existed in fact but in the imagination of Andrew Stuart, so when put to the trial they must necessarily fall to the ground. Thus he has asserted, that colonel Stewart received 350*l.* from the earl of Morton's banker some days before lady Jane's lying-in, and from thence would infer that her delivery in madam Burn's, an obscure house, was only to carry on the imposture ; but now it appears that this money was not paid till sixteen days after. How unfortunate for the duke of Hamilton to be under the direction of such a man ! one who has involved him in such an immensity of expences ! and this by examining a multitude of witnesses upon articles really foreign to the cause ; which indeed is not the duke of Hamilton's, it is the cause of Andrew Stuart, who has acted so strange a part, as well deserved the observation made at the bar with great propriety, " that if ever I was to be concerned in any business with him, I should look upon him with a jealous eye." I shall not follow the noble lord who spoke last through the various descriptions he has given us of midwifery. His observations may be just, but they cannot affect the character of lady Jane Douglas, or the cause of the appellant, her son. The question before us is short : Is the ap-
pellant

pellant the son of lady Jane Douglas, or not? If there be any lords within these walls who do not believe in a future state, these may go to death with the declaration that they believe he is not. For my part, I am for sustaining the positive proof, which I find weakened by nothing brought against it; and in this mind I lay my hand upon my breast and declare, that in my soul and conscience I believe the appellant to be her son.

THE duke of Bedford then spoke in favour of Andrew Stuart's procedure, and in commendation of the *Tournelle*; which finishing in about forty minutes,

LORD MANSFIELD spake to this purpose :

MY LORDS,

I MUST own that this cause before us is the greatest and most important that occurs to me: it is no less than an attack upon the virtue and honour of a lady of the first quality, in order to dispossess a young man of an eminent fortune, reduce him to beggary, strip him of his birth-right, declare him an alien and a foundling. I have slept and waked upon the subject, considered it upon my pillow, to the losing of my natural rest; and, with all the judgement I was capable, have considered the various articles that make up this long and voluminous cause, upon which I am now to give my Opinion before your lordships.

I apprehend, that in the matter before us three things are to be considered—the situation of lady Jane before her delivery, at her delivery, and after it was over—to all which the chancellor has spoke with great propriety. It is proved, beyond a possibility of doubt, that she became pregnant in October 1747, at the age of forty-nine years; a thing far from being uncommon, as is attested by physicians of the first rank, and confirmed by daily experience; and that in the month of July she was delivered of twins, one of whom died, the other is still alive, he has

has been presented to the world by sir John Stewart and lady Jane Douglas as their son; nor can he be wrested from the hands of his parents, unless some other had in their life-time claimed him as their child in a legal and justifiable way.

THIS action, my lords, did not lie against the appellant as an impostor; for an impostor, in the sense of the law, is a person who wilfully and knowingly pretends to be a different one from what he really is, in order to defraud another, and to impose, under a fictitious name, upon the public. If any be an impostor it must have been lady Jane, whom they ought to have prosecuted in her life-time, and not at the distance of nine years after her death. The method of discovering an impostor is to bring his accomplice to the court before which the impostor was arraigned; and if, after a fair trial, the accused person be found guilty, let him take the consequences thereof: but this the respondents have neglected: the appellant has been for five years four months and twelve days the acknowledged son of lady Jane Douglas, and for thirteen years and two months the son of sir John Stewart, before any attempt was made to rob him of his parents, his birth-right, and his all.

As the lord chancellor has anticipated much of what I intended to speak upon this subject, so I shall only touch at the situation and character of the deceased, whom I remember, in the year 1750, to have been in the most deplorable circumstances. She came to me (I being solicitor-general) in a very destitute condition, and yet her modesty would not suffer her to complain. The noblewoman was every way visible, even under all the pressure of want and poverty. Her visage and appearance were more powerful advocates than her voice; and yet I was afraid to offer her relief, for fear of being constructed to proffer her an indignity. In this manner she came twice to my house before I knew her real necessities; to relieve

which

which now was my aim. I spoke to Mr. Pelham in her favour; told him of her situation with regard to her brother the duke of Douglas, and of her present straits and difficulties. Mr. Pelham, without delay, laid the matter before the king. The duke of Newcastle, then being at Hanover, was wrote to; he seconded the solicitation of his brother. His majesty immediately granted her 300*l.* *per annum* out of his privy purse; and Mr. Pelham was so generous as to order 150*l.* of the money to be instantly paid. I can assure your lordships that I never did trouble his majesty for any other. Lady Jane Douglas was the first and the last who ever had a pension by my means. At that time I looked upon her to be a lady of the strictest honour and integrity, and to have the deepest sense of the grandeur of the family from whence she was sprung; a family conspicuously great in Scotland for a thousand years past*; a family whose numerous branches have spread over Europe; they have frequently intermarried with the blood royal; and she herself was descended from Henry VII. I took care that his late majesty should be made acquainted with her family and name, to the intent that, though she was married to colonel Stewart, a dissipated and licentious man, and who had been in the

* The rise of this family was in 767, when Donald Bane (i. e. White) came from the Western Isles with a considerable army, and laid waste the open country with fire and sword. Solnathius, the then king, raised forces, and came up with him at a place called Buna, in Argyleshire. The royalists were routed, till a certain person stood in a defile with a spear, calling out to the fugitives to stop: some of the bravest men crowded towards him, and with these he fell upon the pursuers with a bravery that was irresistible. His corps was augmenting every moment, and the victory was snatched out of the hands of the conqueror. When the particulars of the action came to be related to the king, he desired to be shown the man who had made the first stand; he was answered by one of his attendants, in the Erse language, the then *vernaculum* of the country, ("Sholto fer, "Douglas!) Behold that black grey man!" On this he was called before Solnathius, who gave him the name of Sholto, and that part of Lanerks-shire now known by the name of Douglas.

rebellion 1715, yet he would pass it over, as she was of a race who had always been eminently loyal, her brother having charged as a volunteer at the head of the cavalry in the year 1715; when his cousin the earl of Forfar died like an hero in defence of the government; and that his grace had, in the year 1745, treated the rebels and their leader with contempt and ridicule." And indeed his majesty, from his wonted magnanimity, spoke nothing of her husband, but treated her with all the respect due to a noblewoman of the first rank and quality; one who carried all the appearance of a person habituated to devotion, and for a number of years trained up in the school of adversity and disappointment.

Is it possible, my lords, to imagine that a woman of such a family, of such high honour, and who had a real sense of her own dignity, could be so base as to impose false children upon the world? Would she have owned them on every occasion? Was ever mother more affected for the death of a child than she was for that of Sholto, the younger of her sons? "Will you," said she, "indulge me to speak of my son?" and cried out with great vehemency, "O Sholto! Sholto! my son Sholto!" And after speaking of his death, she said, "She thanked God that her son Archy was alive! What, said she, would the enemies of me and my children say, if they saw me lying in the dust of death upon account of the death of my son Sholto? Would they have any stronger proof of their being my children than my dying for them?" She still insisted, that the shock she had received by the death of Sholto, and other griefs she had met with, were so severe upon her, that she was perfectly persuaded she would never recover, but considered herself as a dying woman, and one who was soon to appear in the presence of Almighty God, and to whom she must answer. She declared that the children Archy and Sholto were born of her body; and that there was one blessing of which her enemies

See p. 17.

mies could not deprive her, which was her innocency; and that she could pray to Almighty God for the life of her other son; that she was not afraid for him, for that God Almighty would take care of him! and what is remarkable, the witness, Mary Macrabie, observed, that the grief for the loss of her child grew upon her. Would she, my lords, have blessed her surviving child on her death-bed? Would she have died with a lie in her mouth and perjury in her right hand? Charity, that thinketh no evil, will not suffer me for a moment to harbour an opinion so cruel and preposterous. Or, can we suppose that two people who had not wherewith to support themselves, would be solicitous for, and shew all the tenderness of parents towards the children of creatures who, forgetting the first principles of instinct and humanity, had sold their children to people whom they did not so much as know by their names. The act of Joseph's brethren in selling him is represented as wicked and unnatural; but indeed the crime of madam Mignon and of madam Sanry is still more black and atrocious. To carry this a little further, suppose lady Jane Douglas had acted this out of a principle of revenge towards the family of Hamilton, yet sir John Stewart had no occasion to do so, much less continue the vindictive farce after her death; especially when married to another spouse. And here we may see sir John as much a parent to the appellant as lady Jane; he was every way fond of him; it is an evidence; I know it to be true: my sister and I have been frequently at Mr. Murray's with them, and were always delighted with the care we observed. No mortal harboured any thoughts of their being false children at that time; I mean in 1750 and 1751. Every person looked upon them as the children of lady Jane Douglas and of colonel Stewart. The countess of Eglington, lord Lindores, and many others, have, upon oath, declared the same thing.

No sooner does the colonel hear of the aspersions raised at Douglas castle, and of Mr. Archibald Stuart's swearing that Count Douglas, a French nobleman, had informed the duke of Douglas that they had been bought out of an hospital, than he returned an answer to Mr. Loch, who gave the intelligence in a letter to Mrs. Hewitt, and wrote him in all the terms of a man of spirit cordially interested in the welfare and happiness of his son. Both he and Lady Jane begged the favour of Chevalier Douglas, a French gentleman and officer, then at London, to acquaint his cousin the Count with what was said of him. This the Chevalier undertook, and fulfilled with the fidelity of a man of honour; and the Count, in consequence of the application, wrote a letter, not only to Lady Jane but to her brother the Duke, in all the language of politeness and humanity, disowning what was said of him.⁷

⁷ See p. 22. Letter I.

BUT, my lords, the Duke of Douglas himself was fully satisfied of the appellant's being the real son of his sister Lady Jane; for, on beginning to be known after his marriage, and to relish the pleasures of social life, he became very inquisitive "about the size, shape, and complexion of the appellant, and if he appeared to be a smart boy." He employed Sir William Douglas, and others in whom he could confide, to inquire of Mrs. Hewitt, Lady Jane's companion, and of Euphemia Caw and Isabel Walker, the two maid-servants who had lived with them when abroad, and observed their conduct in the most unguarded moments, concerning the birth of the children; he even searched into the characters of these; and it appears, from the depositions of clergymen and gentlemen of the first rank in that country, that they were women worthy to be believed.⁸ He even went in person to visit Mrs. Hewitt, conversed with her in presence of his gentleman, Mr. Greenshells, concerning his sister's delivery; and the accounts given by these, like the radii of a circle, all pointing toward one and the same centre, confirming the re-

⁸ See p. 25. Letter I.

ality of lady Jane being the mother of the young gentleman, he was satisfied, acknowledged him for his nephew, and left him his heir.

IF the duke of Douglas, after so serious an inquiry, was convinced, why should not we? 'Tis true, his grace has sometimes expressed himself warmly against the surname of Hamilton even in lady Jane's life-time, but never so warmly as to prefer a supposititious child to the duke of that name*; for he only declares, "that if he thought the children were lady Jane's, he would never settle his estate on the family of Hamilton;" nor did he, till after detecting the frauds and conspiracies that had been so long and so industriously carried on against his sister and himself, make any alteration in his first settlement.

AFTER the duke's death, the appellant was served heir to his uncle, according to the form prescribed by the law of Scotland, upon an uncontroverted evidence of his being the son of lady Jane Douglas, takes possession of the

* From Mr. Greenhill's memorandum, in page 897. of the Defender's Proof, it appears, that White of Stockbriggs, a creature of Archibald Stuart's, assured the duke of Douglas, that lady Jane had hired a mob together about his lodging at Edinburgh; that on the first news of lady Jane's having borne two sons, several people, in the interest of the Hamilton family, assured his grace that the thing was impossible at her time of life; that these children were bought out of an hospital; that Stockbriggs frequently insisted in this manner; that duke Hamilton and major Cockran confirmed the same to be true (see pages 13 and 20 of First Letter); that his grace often declared, "That it was pity that his estate should go to people who would not thank him for it; and if they had the same in their hands, they did not care if he was hanged, dead, and damned." His grace bore the highest personal regard for that duke of Hamilton who died at Bath anno 1743, and who was one of the finest men of the age; but he had not the same regard for that duke's son; for after the rebellion his aversion was so visible, that he would not receive a visit from him, except when he pleased. The disgust arose from duke Hamilton's going over to Lisbon at the time when the Pretender's standard was set up, and never returning till all was over. When, on his first going to court, he solicited the life of the unfortunate earl of Kilmarnock, the king himself intimated to him this part of his conduct.

estate,

estate, and is virtually acknowledged heir by the earl of Selkirk, and by the duke of Hamilton's guardians themselves; for these enter actions before the court of sessions, declaring their right to certain parts of the estates, upon some antient claims which the Judges there declared to be groundless; but in the whole action there was not the least intimation that Mr. Douglas was not the son of lady Jane.

'Tis needless to trouble your lordships with the conduct of the respondent's guardians at Paris, and elsewhere upon the Continent. Nothing has been discovered that could throw the least blemish upon the honour of lady Jane Douglas or colonel Stewart: they have indeed proved her straits there, and his imprisonment here; but both these circumstances carry a farther confirmation that the appellant is their son; for in every letter that passed between them the children are named with a tenderness scarce to be believed; whereas had they been counterfeits, as pretended, they would have been apt to upbraid one another for an act so manifestly tending to involve them in their sufferings.

SUPPOSE, my lords, that Mignon, the glass-manufacturer's wife, the pretended mother of Mr. Douglas, had deposed the same things in lady Jane's presence as she has so long after her death; from her evidence it appears she had never seen lady Jane; by her words both in private and public she seems to deserve no manner of credit; the oath of Mr. Murray, a principal witness, has destroyed everything she has asserted. The same thing might be said of Sanry the rope-dancer's spouse, whose child's rupture we were earnestly desired to keep in view to prove him to have been the identical Sholto, the younger of the twins; and now evidence is offered that the child Sholto had no rupture, but was as sound as any within these walls. Your lordships have been told, and I believe with great truth, that a gentleman, shocked at the assertion, had wrote to

the counsel, that the influence arising from so false a suggestion might be prevented. I always rejoice to hear truth, which is the ornament of criticism, and the polished gem that decorates a bar.

• See page 48. of
Letter 1.

THE scrutiny in France, followed by an action in Scotland, produced two things never intended by them; it brought forth a striking acknowledgment of the appellant by his father sir John Stewart, as is manifest from the bond of provision read at your lordships' bar. Sir John openly acknowledged him before the court of session in the midst of a crowded multitude, and when labouring under a load of anguish and pain; nay, when by himself, he solemnly declared before God, in the presence of a justice of the peace and two clergymen, that the young gentleman was his son. It likewise established the character of lady Jane; for on examining the proof obtained through the vigilance of the duchess of Douglas, lady Jane's reputation is unfulfilled and great: all who had the honour of being known to her, declared, that her behaviour attracted universal esteem; and madam Marie Sophi Gillissen, a maiden lady, with whom she lodged several months, deposes that "lady Jane was very amiable, and gentle as an angel." It farther proved, that the elder child, the appellant, was the exact picture of his father, and the child Sholto as like lady Jane as ever child was like a mother.

I HAVE always considered likeness as an argument of a child's being the son of a parent; and the rather, as the distinction between individuals in the human species is more discernible than in other animals: a man may survey ten thousand people before he sees two faces perfectly alike; and in an army of an hundred thousand men, every one may be known from another. If there should be a likeness of features there may be a dissimilarity of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness runs generally through all these, for in everything there is a resemblance, as of features,

features, size, attitude, and action. And here it is a question, Whether the appellant most resembled his father sir John, or the younger, Sholto, resembled his mother lady Jane? Many witnesses have been sworn to Mr. Douglas being of the same form and make of body as his father; he has been known to be the son of colonel Stewart by persons who had never seen him before; and is so like his elder brother, the present sir John Stewart, that, except by their age, it would be hard to distinguish the one from the other.

If sir John Stewart, the most artless of mankind, was actor in the *enlèvement* of Mignon and Sanry's children, he did in a few days what the acutest genius could not accomplish for years. He found two children, the one the finished model of himself, and the other the exact picture in miniature of lady Jane. It seems nature had implanted in the children what is not in the parents; for it appears in proof that in size, complexion, stature, attitude, colour of the hair and eyes, nay and in every other thing, Mignon and his wife, and Sanry and his spouse, were *toto cælo* different from and unlike to sir John Stewart and lady Jane Douglas. Among eleven black rabbits, there will scarce be found one to produce a white one.

THE respondent's cause has been well supported by the ingenuity of its managers; and great stress has been laid upon the not finding out the house where madam la Brun lived, and where the delivery was effected; but this is no way striking, if we consider that houses are frequently pulled down to make way for streets, and houses are built upon the ground where streets run before: of this there are daily examples in this metropolis. However, we need enter into no arguments of this kind, as there is a positive evidence before us; nor is it possible to credit the witnesses, some of them of a sacred character, when they speak of lady Jane's virtues, provided we can

believe her to have been a woman of such abandoned principles as to make a mock of religion, a jest of the sacrament, a scoff of the most solemn oaths, and rush with a lie in her mouth and perjury in her right hand into the presence of the Judge of All, who at once sees the whole heart of man, and from whose all-discerning eye no secrecy can screen; before whom neither craft nor artifice can avail, nor yet the ingenuity and wit of lawyers can lessen or exculpate: on all which accounts I am for finding the appellant to be the son of lady Jane Douglas.

Die Lunæ 27^o Februarii, 1769^o.

COUNSEL being fully heard, and debate had in this Cause, it is ORDERED and adjudged, that the interlocutor complained of be REVERSED.

DISSENTIENT,

BECAUSE, upon the whole of the evidence, it appears to us, that the appellant hath not proved himself to be the son of lady Jane Douglas, and consequently not intitled to the character of heir tailzie and provision to Archibald duke of Douglas.

BECAUSE we are of opinion, that it is proved that the appellant is *not* the son of lady Jane Douglas.

BEDFORD,
BRISTOL, C. P. S.

SANDWICH,
DUNMORE,
MILTON.

No. XV.

The SPEECH of LORD CHANCELLOR JEFFERIES
on OCCASION of CREATING SIR EDWARD
 HERBERT LORD CHIEF JUSTICE OF THE KING'S
 BENCH*.

DIE VENERIS 23th OCTOB. 1685.

THIS being the first day of the terme, sir Edward Herbert performed the usuall ceremonies at Westminster-hall, at the courts of chancery and common pleas, for being made a serjeant at law, and gave this motto in his rings :

Jacobus Vincat, Triumphat Lex.

AFTER which the lord chancellor came into the court of king's bench ; and being seated in the chief justice's place, sent an officer of the court to call mr. serjeant Herbert, who was brought to the barr of the king's bench court, ledd by sir George Stroud and sir Thomas Stringer, two of his majesty's serjeants at law, and the lord chancellor made this speech to him :

MR. SERJEANT HERBERT,

I PRESUME It is not a surprize to any here if I tell you, sir, the king has sent for you to supply the vacancy

* Found among the MSS. of the late sir Joseph Jekyll, and communicated to the Editors by JOSEPH JEKYL, Esq. barrister at law, of Lincoln's Inn, F. R. S. F. S. A.

See Roger North's *Life of Lord Keeper Guilford*; at the close of which there is a variety of anecdotes relative to the lord chancellor Jeffries's conduct towards persons of a party description ; particularly those of the denomination of Trimmers, whom he so pointedly alludes to in this speech here given.

of the chief justiceship of this court; a place, perhaps, of as great concern and importance to the king and his people, as any other place in the nation. But though it be soe, yet I am to tell you, sir, his majesty thinks you fit for it (though I know you have other thoughts of yourselfe), and therefore this place (I must doe you that right) is conferred upon you without your own seeking.

BUT, sir, his majesty has kind, gracious, and just remembrances of the great services and sufferings of your father with that blessed martyr king Charles the First, and with gracious king Charles Second, of ever blessed memory. His majesty also has had experience of the services even in times of great danger, in storms both at sea and land, of some other of your relations who have hazarded their lives in the service of the crowne.

THESE things might justly create gracious intentions in his majesty's breast towards you; but, sir, I am to acquaint you, that it is not for that meritt which reflects on you from your relations that you are called to this honour and dignity; his majesty has had a great and long experience of your ability and fidelity both to him and his people in the discharge of an eminent place of judicature in this kingdome, as well as in another. He is very well satisfied of and pleased with your great courage and good conduct in that imploy, and for that reason hee hath now chosen you to serve him in this high and difficult station.

SIR, I can tell by my owne experience, it is a place of great labour and fatigue; but I blesse God, with those good assistances I had, I was able, in some measure, to cope with those difficultyes. And indeed I had very great assistances. I had assistance from the learned, ingenuous, and therefore loyall gentlemen of the barr, who tooke a great deale of care and pains to make the court understand what was for the benefit of their clients, and not to prate impertinently to please the audience; for if wee mett with
any

any such, they were sure to meet with a rebuke; and therefore I cannot part with this seat where I have had the honour to sitt, without giving them all hearty thanks for their assistance.

BESIDES this, I was assisted by a learned, grave, and judicious bench, of whom there remains two learned gentlemen that sitt on each hand of mee, who had long experience of the practice of the court, and withall of undaunted courage to performe their duty. And I cannot but remember that wee sate together here in times as full of stormes and troubles as folly and madnes, faction and rebellion could make them; yet, with God's blessing, wee were enabled to discharge the duty of our places soe faithfully, that our services were accepted and gratioously approved of by the late king, and by our present soveraigne, whom, I pray, God long may continue to reign over us.

NOR must wee forgett that wee had the benefit of an ingenious and industrious company of officers, who behaved themselves in their severall places with all diligence and integrity.

SIR, you will have all those assistances; and besides those, you will have a great advantage in your own abilities, which I am sure will carry you much farther than those that your predecessor could any way pretend to.

SIR, I have yet a farther encouragement for you: you have the promise of a gracious king; one knowne to all the world never to have broke, nay I may say (pardon the expression) that durst not breake his word; he has promised you his royal countenance and assistance: and if so, goe on, be prosperous! be undaunted and courageous! incourage all vertue and morality, suppress all vice and iniquity; be sure to execute the law to the utmost of its vengeance upon those that are now knowne, and we have reason to remember them; by the name of WHIGGS! and you are likewise to remember the SNIVELLING TRIMMERS; for you know what our Saviour Jesus Christ says in the Gospell, that "they that are not for us are against us!"

SIR,

SIR, when I have sayd this to you, pray give me leave to putt you in mind of one thing or two. I know you will be very indulgent, and kind, and affectionate to the gentlemen at the barr who stand round about you. As you will be well pleased with the assistance, soe you will listen to the counsell of your bretheren upon the bench. You will have a care to give all fitting countenance to those inferior magistrates who serve the king honestly and faithfully, and desire to keepe his peace inviolate, though perhaps they have not arrived to that perfection of knowledge in the law which is the good fortune of a particular education in the profession.

IN short, sir, I doubt not but you will take care that the processe of this court neither be injurious to the king nor oppressive to the subject; which they will not be if they be kept from being too numerous on the one hand nor too dilatory on the other.

IN fine, sir, as the summe of all your duty, Fear God and honour the King; but use your utmost authority for the suppression of those that are given to change.

I HAVE now noe more to trouble you with, sir, but am ready to administer you your oath, and deliver you your writ *.

* The free and violent manner in which this singular character used to express himself on the bench, of which the present speech affords a striking instance, is well known; and the aversion which he entertained particularly against the Trimmers is recorded in a remarkable anecdote in that entertaining and useful piece of biography before-mentioned, which is recommended as particularly interesting to professional readers, from whence we shall extract it. "One of these intemperances was fatal to him. There was a scrivener of Wapping brought to hearing for relief against a summary bond. The contingency of losing, all being shewed, the bill was going to be dismissed: but one of the plaintiff's counsel said, that he was a strange fellow, and sometimes went to church sometimes to conventicles, and none could tell what to make of him; and it was thought he was a Trimmer. At that the chancellor fired. "And a Trimmer!" said he: "I have heard much of that monster, but never saw one. Come forth, Mr. Trimmer; turn you round, and let us see your shape!" and at that rate talked so long, that the poor fellow was ready to drop under him; but at last the bill was dismissed with costs, and he went his way. In the hall."

SPEECH OF LORD CHANCELLOR JEFFERIES.

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"hall one of his friends asked him how he came off. *"Come off!"* said he,
"I have escaped from the terrors of that man's face, which I would scarce un-
dergo again to save my life; and I shall certainly have the frightful im-
pression of it as long as I live." Afterwards, when the Prince of Orange
 came, and all was in confusion, this lord chancellor, being very ob-
 noxious, disguised himself in order to go beyond-sea. He was in a sea-
 man's garb, and drinking a pot in a cellar. This scrivener came into
 the cellar after some of his clients, and his eye caught that face, which
 made him start; and the chancellor, seeing himself eyed, feigned a cough,
 and turned the other way with his pot in his hand. But mr. *Trimmer*
 went on and gave notice that he was there; whereupon the mob
 flowed in, and he was in extreme hazard of his life; but the lord mayor
 saved him and lost himself. For the chancellor being hurried with such
 croud and noise before him, and appearing so dismally, not only disguised
 but disordered, and there having been an amity between them, as also
 a veneration on the lord mayor's part, he had not spirits to sustain the
 shock, but fell down in a swoon; and, in not many hours after, died."
 North's Life of Lord Keeper Guilford, page 220.

* Sir JOHN SHORTER.

No. XVI.

• *On the INTEREST of the HUSBAND in the REAL and*
 • *PERSONAL ESTATES and CHATTELS REAL and*
PERSONAL of the WIFE.

A MAN marries a woman that hath an estate of inheritance and an estate for life, and a lease for years, or other chattels real; also debts owing to her, and goods or chattels personal.

THE question is, What doth the law give to the husband by the intermarriage, without any other gift to him from his wife?

THE answer must be several, to wit, 1st, If the woman at the time of the marriage hath an estate in fee-simple, or an estate tail (which are the estates of inheritance) in any lands, tenements, rents, or other hereditaments, the husband is immediately seised of the freehold, not in his own right but *jure uxoris*, and he shall have the profits thereof during their joint lives; and if he hath a child by her born alive (although it die),—yet, after the wife's death, the husband shall hold the said land, or other hereditaments, during his own life, as tenant by the courtesy. But if the husband die before the wife, she shall have her own inheritance again, immediately after his death, to her and her heirs. And if the wife die before the husband, and there hath been no child born alive, then the heirs of the wife (whether it be her brother, sister, uncle, aunt, or other cousin of her blood) shall, immediately after her death, have the land from the husband. And if the wife die before the husband, and there hath been a child born alive, then, after the husband's death, (*viz.*) when his estate by the courtesy,

courtesy ends, the heir of the wife shall have the land. The husband and wife at any time by a fine may sell or give away this land as they both please; and the husband alone, without his wife, may grant or charge the land during the joint lives of him and his wife; and if he hath a child by her, then during his own life. But the husband alone, as the law stands at this day, cannot make any alienation or discontinuance that shall hinder the wife or her heirs, after his decease, from having the land or hereditaments; and if he commit treason or felony, her estate shall not be forfeited, but only the profits during the coverture; but for her own treason or felony it will be forfeited for ever. See 31. H. 2. c. 21.

SECONDLY, If the woman at the time of the marriage hath an estate of franktenement, that is, if she hath an estate for her own life, or for the life of another person, or an estate in dower (which she may have from a former husband), immediately upon the intermarriage her husband is seized of the freehold of such an estate in the right of his wife, and shall have the profits thereof during the intermarriage; but, if he dies, the estate for her own life will be quite at an end, and her husband cannot be tenant by the courtesy in this case. But if she had an estate for the life of another person that survives her, then the husband may be the special occupant, and have the land during the life of that other person only. And after those estates for lives are ended, the land goes to those that have the next in reversion or remainder, which generally are strangers. The husband and wife, by a fine, may sell and dispose of any such estate for life, or the husband alone may dispose of the land during the coverture between them; but it being an estate of freehold, no single act of his own can alien this estate for life so, but that the wife surviving the husband will have it again as she had before the marriage. See 1. Wil. 4. c. 2.

THIRDLY,

THIRDLY, If the woman at the time of the marriage hath a chattel real, (*i. e.*) a lease for years, or an estate in land, actually extended upon a Statute Merchant, Statute Staple, Recognizance, or Elegit, to be holden till a debt is satisfied to her, then the husband, immediately upon the intermarriage, is possessed of such lease or other chattel real in right of his wife; and as to these, the law gives him power (without her) to sell, assign, surrender, or otherwise dispose the same as he pleases by any deed or act executed in his life-time, but not by his will or testament; and if he commits felony or treason, he forfeits the same, and the sheriff may sell such term or interest, upon an execution, for the husband's debts. But if the husband does not sell, surrender, or otherwise as aforesaid dispose of or forfeit the same in his life-time, then the wife, after his death, will have such lease, estate, or interest again in her own right, without being executrix or administratrix to her husband. And if he shall have granted a rent-charge out of the same (without altering the estate of the land, as he might have done), the rent-charge will be void after his death; but if he survives his wife, the law gives him her chattel real intirely.

FOURTHLY, If the woman at the time of her marriage hath debts owing to her by Statute Merchant, Statute Staple, or Recognizance not executed, or upon bonds, bills, notes, or other specialties, those and the like are called *choses en action*, because they do not lie in seisin or in possession, but she had a title to recover the same by an action at law. The husband, at any time during the coverture, hath power to sue for these debts, and to recover, and then to have the same to his own use, or to release or discharge the same as he pleases; or the husband, at any time during the coverture, may change the securities (if the debtor will consent thereunto), by cancelling the same, and

and taking new security for the debt in his own name, and to his own use: but if he dies before he recovers the money, or alters the security, so that the nature and property of the debt is not altered, then the wife will be intitled thereunto in her own right, without administering to him or being liable to his debt, and yet he may have other executors or administrators of his own personal estate.

FIFTHLY, All the goods and chattels personal which the woman hath at the time of her marriage, are by law intirely given to the husband; namely, all ready money, plate, jewels, household goods, horses, cows, and other cattle, wares, merchandizes, and all moveables in general, so that he may not only sell or give the same as he pleases, but upon his death the same will go to his executors or administrators, and she cannot have the same unless by gift from him, or by being his executrix or administratrix.

NOTE. If a woman have a right to any chattels, and be ousted and dispossessed thereof, and then takes a husband who survives the wife, not having recovered the said right in her life-time, then the executor or administrator of the wife, and not the husband, shall have such a kind of right; but the husband may administer to his wife if he pleases.

NOTE also, That if a woman be executrix or administratrix to another person deceased, which might be a first husband, then she is said to be possessed of the estate *en auter droit*, (i. e.) in right of the testator or intestate, and the law doth not give any such estate to the husband that she shall afterwards marry; for the goods, chattels, and debts, in this case, never were her own, but intrusted to her upon account; and it is an usual thing that a woman intending to marry who hath a valuable lease, will, before marriage, assign the same to trustees for her own.

See 1. Eq. Ca.
Abr. 58. Such
assignment must
be made with
husband's con-
sent and privity,
2. Vern. 78.

own benefit, so that her husband shall not intermeddle therewith, and the trust of this lease (as is said) will not go to the husband; but it seems fair to give him notice of such assignment, or else he should not be concluded in equity.

In the Case of Pitt v. Hern, the then lord chancellor seemed to be of opinion, that the husband should be made a party to such assignment in order to be barred.

No. XVII.

*An ANALYSIS of the THEORY and PRACTICE of
CONVEYANCING*.*

THE common conveyances of this kingdom are of two sorts, and made two manner of ways, viz. by matter of record or by deed.

By matter of record two conveyances are made, viz. a fine and a common recovery.

By matter of deed are eight conveyances.

1. FEOFFMENT. 2. Grant. 3. Bargain and sale by deed indented or inrolled. 4. Lease. 5. Exchange. 6. Surrender. 7. Release or Confirmations. 8. Devise, or Will and Testament. 9. Covenant to stand seised.

THE NATURE OF A FINE.

THE word fine is ambiguous; but is here taken for a FINE, final agreement or conveyance upon record for the settling and securing lands and tenements.

IN every fine a suit is supposed, wherein the party who is to have the thing is called the plaintiff, and sometimes the conusee; and he who parts with the thing is called the conusor, and sometimes the defendant.

IT is called *finalis concordia*, because it puts an end to the suit, the parties thereby becoming agreed.

A FINE is thus fully described: It is an instrument of record of an agreement concerning lands, tenements, or hereditaments duly made by the king's licence, and ac-

* The present Treatise, which comprehends a view of the whole law of Conveyancing, follows the method and arrangement of that excellent treatise on the subject entitled, "Touchstone of Common Assurances," and may be considered as a compendious abridgment of that approved work.

knowledge by the parties to be the same upon a writ of covenant, writ of right, or such like thing, before the justices *C. B.* or others thereto authorised, and engrossed of record in the same court, to end all controversies thereof between themselves who are parties and privies thereto, and all strangers not claiming in due time.

• THERE are five essential parts of a fine :

1. THE original writ taken out against the conusor.

2. THE king's licence of levying a fine, for which the king is to have a fine called the king's silver.

3. THE conuſance, or concord itself, which is the very agreement between the parties who intend to levy the fine, how and in what manner the thing shall pass; and it begins, "*Et est concordia.*" This is the foundation and substance of the fine.

4. THE note of a fine is, that it is an abstract of the original contract or concord, and begins, "*Int. A. querentem & B. & C. deforciantes.*"

• 5. THE foot of the fine, which begins, "*Hic est finalis concordia,*" &c. and contains all the matter, day, year, and place, and before what justice it was levied: it is called the foot because it is the last part of it, and the indentures are made by the chirographer, and given to the party to whom the conveyance is made; and this is called the fine.

THE DIVISION OF FINES.

FINES are of two sorts; without a proclamation, or with: the former is called a fine at common law, and the latter is made according to the statute, because the form and manner of it is ordained by statute 4. *H. 7. c. 24.*

THE manner and order of levying a fine is thus :

AN original writ is issued out—This may be any writ of right whereby land is demanded or may be recovered, but a writ of covenant is most usual. It must bear *teste* before the *dedimus potestatem*, else the fine is erroneous.

AFTER

• AFTER this there is the *præcipe*, which is the title of the writ whereof the fine is levied, and the concord and agreement of the parties; both which are to be fairly wrote, most commonly in parchment.

THEN the parties who are to acknowledge and levy the fine are to come in person before him or them that have power to take the conuſance, who are to take notice of the persons.

THEN all the parties who are to levy the fine are to declare themselves before the judges or commissioners to be willing to pass their right that they have in the land according to the agreement, and to subscribe their names or marks to the concord.

AND if it be taken by a special *dedimus potestatem*, it must be returned and certified under the hands and seals of the commissioners into the court of common bench, that it may be there recorded and finished.

THEN the conuſee is to compound with the king for his licence, for which he is to pay the king's silver, which is to be entered on the back of the writ of covenant, and then enrolled by the *custos brevium*; and on this roll the proclamations are to be indorsed.

THEN it is to be brought to the chirographer, who is to make the note of it. Hereupon, if it be a remainder, reversion, rent, &c. whereof the fine is levied, the writ of *quid juris clamat quem redditum reddit*, &c. must be sued forth.

THEN the chirographer is to enter the fine of record, to engross it, and to make and deliver the indentures to the conuſee; and if it be a fine with proclamation, it is to be proclaimed openly in the court of common bench every four terms after the engrossing it.

AND the next term after the engrossing it the contents are to be recorded in a table made for that purpose, to be set up in the court of common bench at Westminster in

an open place all the term; and so also at every affizes the fine may be inrolled and exemplified.

THE POWERS AND USE OF A FINE.

THE fine is of great antiquity for credit and esteem, and is now become a formal conveyance; and is of that force, that it passeth all the right and interest of the conusor to the conusee, and works by way of extinguishment or estoppel, and for ever, bars the conusor and his heirs of all present and future right to the thing whereof the fine is levied; and if it be with proclamation, it in time becomes a perpetual bar to all persons also that have right, except they prevent the bar by their claim, action, or entry, within five years after the proclamation is ended; and it bars entails peremptorily, whether they do claim within five years or not.

ANY person able to grant may levy a fine and be conusor; and any one that may be a grantee in a deed may be a conusee in a fine.

THE conusor and conusee's names must be certainly set down; and if there be two of a name, it is convenient to make some distinction, as senior or junior, &c.

THE judges for recording fines are the justices of common bench.

A FINE may be levied of all things whereof a *præcipe quod reddat* lies. Things that pass by a fine must be named to lie in the shire, town, parish, or hamlet where it doth lie.

THE more worthy things must be set down before the less worthy—as a manor before a messuage, a castle before a manor; then a house, arable land, meadow, pasture: general and entire things before special, and parts of things and particular things after this manner: *Messuagium, tectum, molendinum, columbare, gardinum, terra, pratum, pastura, boscus, bruera, mora, juncaria, mariscus, alnetum, ruscaria, redditus.*

BUT

BUT if a tenant for life levy a fine of his land to a stranger to hold to the conusee for a longer term than for the life of tenant for life, though the fine be good, yet it is a forfeiture of the estate.

No sole member of a corporation, aggregate of many, can levy a fine of the lands of the corporation, but they may levy fines of the land they hold in their own right.

SUCH as have estates of freehold in ecclesiastical lands in right of the church, as bishops, deans, prebends, and parsons, may not levy a fine of such land; for if they do it will not bind the successor.

HE who hath lands in fee-simple in right of his wife, ought not to levy a fine without her; and if he do, she and her heirs may avoid it after his death.

IN the concord of a fine, these things following are to be observed (to wit):

1. WHEN a fine is levied to divers conusees, the right shall be limited to one of them.

2. THE estate shall be limited to the heirs only to whom the right is limited, and not to the heirs of all the conusees.

3. THE release and warranty must be from the heirs of one conusor, if there be many; for in a fine from divers, the fee is supposed to be in one only.

4. THE concord needs not to rehearse all the special names of the things mentioned in the writ, it is enough to say *tenementa prædicta, &c.*

5. THE concord must pursue the original writ, and cannot be of any thing not contained in the writ.

A FINE levied by covenant by tenant for years, or life, or a copyholder, with intent to bar the reversion or lord of the inheritance is of no force, and non-claim within five years in this case will not hurt. A fine without proclamation bars none but parties or privies thereto, but a fine with proclamation is now much of the same virtue as that at common law was, and concludes all parties,

ties, privies, and strangers, except *femes covert*, infants, persons imprisoned, out of the realm, and *non-fane* memory, so as they or their heirs bring their actions or enter within five years after these impediments removed.

FOR the better understanding of this, observe, that the parties barred by a fine are,

I. PARTIES. II. Privies. III. Strangers.

I. PARTIES (of the age of twenty-one years) are barred for ever by a fine, and they have no time to preserve their right.

II. PRIVIES being heirs and executors to the parties, and void of impediment at the time of the fine levied, are barred for ever by fine, and have no time to claim and preserve their right.

III. STRANGERS are such,

1. As have a present right and no impediment; and these are barred if they make not their claim in five years after the proclamations.

2. SUCH as have a present right but have an impediment; and they have five years to claim after the impediment removed.

3. SUCH as have neither a present nor future right at the time of levying the fine, by reason of any matter before the fine, but whose title groweth either entirely after, or partly before and partly after the fine, are not barred at all by the fine, but may claim when they will.

THOUGH a fine with proclamation is a continual bar to any heir in tail, though under age when the fine was levied, yet it is no bar to the remainder-man, or reversioner, when the estate tail is spent.

If the husband levy a fine of the wife's land, that is no bar to her when he is dead; but she is barred for ever unless she claim within five years after his decease.

If disseisor levy a fine of disseisee's land, if disseisee do not claim within five years, he is for ever barred; but if another

another levy a fine of land which I am possessed of, this does not hurt me, for a fine cannot be levied of any land but that which the conusor hath in possession.

WHERE there is a precedent agreement of the parties, as a feoffment, the fine shall not pass any thing, but work only by way of corroboration, and this is called a fine executed; but if there be no such agreement, then it is a fine executory, and is as good as actual seisin.

A FINE may be avoided,

1st, BY death of the parties after conusance before recording it.

2d, BY covin in the procuring it.

3d, BY error in the proceeding and issuing out of the fine, and this is done by writ of error; but the error to make the fine voidable must be notorious, because the thing is done by consent, *et consensus, &c.*

4th, BY action, claim, or entry of a stranger that hath right, if he doth it by authority from and with the consent of him who hath right.

5th, BY plea; as,

(1.) BY averment of continuance of seisin of land in another at or before the time of the fine levied.

(2.) BY averment that *partes finis nihil habuit tempore levationis finis*, and then he must shew in whom the estate was.

(3.) BY the sentence of a court, when it appeareth that it is gotten or obtained by some notorious fraud.

THE NATURE OF A COMMON RECOVERY.

A RECOVERY, in general, is obtaining any thing unjustly taken, or detained by judgment or trial at law; COMMON RECOVERY. but the common recovery here meant, being the assurance of land, is a certain form and course set down to be observed for the better assuring of lands; it is somewhat like a recovery upon title; but this is with the will and

consent of the person against whom the recovery is had, and that is against it; for in this colourable suit there is a demandant, who is called a recoveror, the vouchee called the recoveree, and one who is called to warrant upon a supposed warranty, who is called the vouchee.

• THE common recovery is sometimes with a single, sometimes with a double voucher: the first, when the writ is brought against him who is to pass the land immediately, and he vouches over the common vouchee; the second is, where the writ is brought against another to whom he who passeth the land hath aliened it, and he vouches him who is to make the assurance, and he vouches over the common vouchee, this last is the safest and surest kind of recovery.

THE form of proceeding in this case is thus: by agreement of parties a real action is begun by writ of entry brought by him who is to have the land assured against him who is to make the assurance, if it be with a single voucher; and if with a double voucher, against him to whom he that is to make the assurance hath aliened; and in this suit the recoveror who brings the action surmisseth, that the tenant against whom the writ is brought hath no right to the land, but that the recoveror hath right thereto, and that the tenant came to it from such a stranger whom the demandant doth name the tenant.

AND to this the tenant doth appear in person, or by attorney, and then doth enter in defence of the land; but in pleading doth vouch to warrant a stranger of whom he bought the land, and by the conveyance thereof bound him and his heirs to warrant and make good the title to him, and thercon plays that the stranger may be brought in to defend the title, and then he is allowed by the court to call him in to say what he can for the justifying of his title to his land before he so conveyed it. And hereupon a stranger appears, and makes shew as if he would defend the title, but prays that a further day may be appointed
by

by the court to make his defence; which being granted, at the day appointed he, by agreement and coven of parties, doth not come in, but makes default, and thereon the land is to be recovered by him who brought the writ against the tenant, and he is left for his remedy to the stranger upon his warranty; and accordingly judgment is given by the court that the demandant shall recover the lands demanded against the tenant, and that the tenant shall recover so much land of the stranger in recompence of the land recovered from him, which he ought to have warranted and defended; and this recovery over is called a recovery in value.

BUT if the recovery be with a double or treble voucher, the stranger is, on his appearance, to call to warrant *T. D.* and alledge it in the same manner that the tenant doth, and so pray that he may come in; and thereon *T. D.* appears and makes default; and so if there are more vouchers.

BUT the vouchee is always the common vouchee, who is one of the criers, *C. B.* worth nothing, and that hath no land to render in value on the supposed warranty.

THUS the land is assured to the purchaser, the recoverer of consent letting the land go and recovering nothing in value; and hereby are lands in tail commonly fold and converted into a fee-simple. A recovery, being matter of record, is much of the nature of a fine, and is a thing whereof the law takes notice, it being now become one of the conveyances of the kingdom, and hath a special virtue and use to bind estates tail.

THE REQUISITES TO A GOOD RECOVERY.

1st. THAT there be a demandant, tenant, vouchee, as the efficient causes thereof.

2d. LAND demanded as the matter, and that the thing be demandable.

NOTE,

NOTE, That a writ of entry for suffering a recovery may be had of those things for which a writ of covenant may be had for levying a fine.

3d. THAT it be had and suffered in that form and order that the law requires, and is before laid down.

4th. A LAWFUL tenant to the *præcipe* is, that the writ of entry be brought against him who is tenant of the freehold by right or wrong.

5th. THAT it be in such a case as is not prohibited by any statute; for if the king gives land in fee-simple or tail, or remainder to the crown in fee or tail, the recovery suffered by such a tenant is void.

HOW A RECOVERY MAY BE DEFEATED, FRUSTRATED, OR AVOIDED, FOR MANY CAUSES; AND THAT IS CALLED SATISFYING A RECOVERY.

1st. FOR that there is some gross error in the manner of the proceeding.

2d. FOR that he against whom the recovery was brought was not tenant of the freehold.

3d. THAT the recovery be had by covin.

NATURE OF A DEED.

DEED. A DEED is an instrument on paper or parchment, written, sealed, and delivered, to prove and satisfy the agreement of the parties whose deed it is to the things contained in the deed.

DEEDS are, indented, or poll. The deed indented, which is an indenture, is when the paper or parchment is cut and indented; it is a writing containing a conveyance, bargain, contract, covenant, or matter of agreement betwixt two or more, and is indented on the top or side, answerable to another that doth comprehend the self-same matter.

THE deed poll is plain, without any indenting where the paper or parchment are cut even, and this is single and but

but one, which usually the feoffee, lessee, or grantee hath; but the deed indented is *bipartite*, *tripartite* or *quadrupartite*.

AND then each party hath a part of the indenture, and, according to their parts, they do interchangeably seal to one another; but the part sealed by the feoffor, lessor, or grantor, is said to be principal or original, the rest counterparts or copies; yet all make in law but one entire deed.

AN indenture made in the first or third person is good enough; the deed poll is generally made in the first person, but the third person will do.

OF deeds, some are absolute, some conditional, some inrolled, and some not; some concern the realty, some the personalty, and some are mixed. Some of these contain matter of grant or gift, as feoffments, gifts, bargains and sales; grants and leases are the chief. Some contain matter of discharge, as releases, acquittances, defeasances, &c.: some contain other matter, as confirmations, &c. Others distinguish themselves thus: some are constitutive, some remissory or liberatory of the former: some are creating, whereby an estate or obligation that had no existence before is newly raised; as the first grant of a rent, common way, estate tail, for life, or years, &c.: some are conveying; by which estates, property, or the like, being already created or conveyed to others, as feoffments, bargains and sales, grants over, or assignments and surrenders: and seeing those that are of the last sort do describe and testify some precedent contract, or duty so paid, performed, or done, released or discharged; of which sort are all acquittances, releases, and such like matters of discharge; every agreement put in writing, and sealed and delivered, becomes a deed. "It is agreed that the grey mare, &c. In witness whereof we have set our hands and seals. Note, the parties were not otherwise named in the deed."

ADJUDGED,

ADJUDGED, that an action would lie by the bare signing and sealing. 1. Salk. 214.

IN every deed there are two parts considerable.

1st. THE external or material parts are the parchment, wax, and writing.

2d. THE internal intellectual parts are the sense, force, virtue, and operation of the words and matter therein contained.

IN the writing of divers deeds, as feoffments, grants, leases, &c. there are certain formal parts which make up the whole of which the law takes notice especially; as,

1st. THE premises; the office whereof is rightly to set down the name of the feoffor, grantor, lessor, &c. and to comprehend the certainty of the things granted or set.

PARTIES not named in the deed, otherwise than by signing, adjudged good. 1. Salk. 214.

1. the defendant do promise and engage to bring in the body of *H.* to the custody of *B.* &c. and the plaintiff not named in the deed, which is a deed poll, yet the party must be named in it. 1. Salk. 197.

2d. THE *habendum*; the office whereof is to name again the feoffee, lessee, &c. and to set forth what estate he shall have, and for what time he shall hold the same.

3d. THERE is set down upon what terms or conditions the estate of the thing granted shall be to be held; therefore a *tenendum* is sometimes inserted to set forth by what tenure the grantee shall hold the land granted; sometimes a reservation, to shew by what rent he shall hold the land; sometimes a condition.

4th. WARRANTY.

5th. COVENANTS.

6th. THE conclusion after the manner of *cujus rei testimonium*, wherein is set forth the date of the deed, containing the day, month, and year, and the stile of the king, and the year of our Lord

To the making a deed containing any agreement, it is therein requisite,

1st. THAT it be written on parchment or paper, and that the agreement be legal and formally set down, and be sufficient in law for the composition and frame of words.

2d. THAT there be a person able to contract and be contracted with, and a thing to be contracted for; and that all these be set down by sufficient names.

3d. READING: (*i. e.*) That if it be an illiterate man who is to seal the deed, and he desires to have it read, that it be truly read.

4th. SEALING. That a deed be sealed by the party for a further testimony of his consent thereto.

5th. THAT the deed so writ and sealed be delivered by the party, or some other by his appointment as his deed.

6th. THAT the ground and foundation of making the deed be good, and not against law.

BUT in some cases, to perfect the contract and make the conveyance of the thing intended thereby good, some ceremonies are requisite, as inrollment, livery of seisin, attornment, &c.

A DEED may be avoided on several accounts:

1st. WHEN made with an intent to deceive and defraud one that shall afterwards buy the same thing.

2d. WHEN made with an intent to deceive creditors of their just debts.

3d. WHEN made to defeat the king or other lords of their wardships.

A DEED good in creation may become void *ex post facto*:

1st. BY rasure, interlining, or addition of things either added or blotted out of essential moment.

2d. IF after the deed perfected or delivered the seal happen to be broken off or utterly defeated.

3d. IF a deed be delivered up to a person bound by it, to be cancelled, and it be so.

4th. A

4th. A GOOD deed may be avoided by sentence or order of a court, when it appears that it was done by fraud, force, circumvention, or such like practice; and this is called the vacating of the deed. All deeds take effect and work from the time of their delivery; and this is presumed to be the time of their date, if the contrary do not appear.

A DEED may also be avoided, sometimes by plea; as a man may plead *non est factum*; either when the deed wants writing, or signing, or delivery, as is before set forth, or if altered by rasure or the like.

As the claim of a deed, whereby the feoffor, donor, or grantor, &c. doth except somewhat out of that which he before granted by the deed.

IN every good exception these things must always concur :

1. IT must be by apt words.
2. IT must be of part of the thing granted.
3. IT must be only of part of the thing, and not of all; or if I grant to one all my lands in Black Acre and White Acre, excepting those in White Acre.
4. IT must be such a thing as is severable from the thing granted.
5. IT must be of such a thing as he that doth except may have, and doth properly belong to him.
6. IT must be a particular thing out of a general.
7. IT must be certainly set down and described.

A RESERVATION is a claim of a deed whereby the feoffor, &c. doth reserve somewhat new out of that which he had before granted; but this differs from an exception, in that the thing excepted was in use before, but the thing reserved is newly created by this reservation.

THESE things are requisite to a good reservation :

1. IT must be by apt words.
2. OF some things issuing or coming out of the thing granted, and not part of the thing itself, or of something issuing or coming out of another thing.

3. OR

3. OF a thing where the grantor may have resort to distrain.

4. IT must be made to one of the grantors, and not a stranger to the deed.

As for the construction of deeds, it must be considered,

R. How, a deed in the gross shall be taken and enured?

CONSTRU-
TION OF
DEEDS.

II. How it shall be taken and expounded in the several parts?

As to the first, observe these rules.

1st. IF divers join in a lease or deed, and some are able to join in a deed and some are not, this shall be said to be his deed alone that is able.

2d. DEEDS indented and made to one purpose may enure to another.

3. WHEN a deed may enure to divers purposes, he to whom it is made may have the election which way to take it, and may take it that way which will be most for his advantage.

4th. IT shall enure, as much as may be, according to the apparent interest of the parties.

5th. IF one have divers estates in lands, and he make any charge or grant upon or out of it, this shall issue out of all his estates.

FOR the construction of the several parts, there are some rules in general:

1st. THAT the construction be as near the minds of the parties as possible, and favourably so.

2d. THAT it be reasonable, and according to indifferent and reasonable understandings.

3d. TOO much regard is not to be had to the nature and proper distinction, signification, and acceptance of words and sentences, to prevent the simple intentions of the parties.

4th. THAT one part of the deed be construed and help to expound the other, and that the parts are presumed to agree one with the other.

5th. THAT

5th. THAT the construction be such, as the whole deed and every part of it may take effect to the purpose, as much as may, for which it was made.

6th. ALL the words in the deed are to be taken most strongly against him that speaks them, and in most advantage to the other party.

7th. IF there be two clauses in a deed repugnant one to another, the latter shall be rejected; but on the contrary in wills.

8th. THAT which is generally spoken be generally understood, unless it be qualified by some special subsequent words.

9th. THAT if words admit of a double intendment, and the one is with law and the other against it, it is to be taken in that sense which is law.

10th. THAT things doubtfully set down be applied to him to whom they are properly belonging.

11th. THAT such constructions be made of abbreviations as the deed may not lose its force.

As to the several particulars of a deed, observe these rules touching the things granted:

1st. THAT when any thing is granted, all the means to obtain it, and all the fruits and effects of it, are granted; as by the grant of ground the way to it is granted.

2d. THE incident, necessary, appendant, and regardant shall, in most cases, pass by the grant of the principal.

3d. THAT which is parcel of the essence of a thing, although at the time of the grant it be actually severed from it, doth pass by the grant of the thing itself; so by the grant of a mill the mill-stones pass.

4th. BY the grant of the land or ground, all that are *supra*, as houses, trees, &c. are granted.

5th. WHEN any matter of interest or profit is granted, it shall be taken largely; but when a matter of ease or pleasure, as a walk, &c. it shall be taken strictly.

6th. WHEN

6th. WHEN a man grants all his lands or goods, not only what he is solely possessed of, but what he is jointly seised of.

II. As to the words and terms whereby things pass, observe,

1st. SOME words are collective and compound, comprehending many things; as hereditaments, lands, tenements, honours, villages, &c.

2. SOME words are simple and particular; as meadows, pastures, wood, moor, &c.: and note, that these words in a grant do pass all things they comprehend and signify.

THERE are three things more in a deed to be observed:

CONDITION,

COVENANT,

WARRANTY.

A CONDITION is a kind of bridle annexed to one's act, staying and suspending the same, and making it uncertain whether it shall take effect, and whereby an estate may be either defeated, created, or enlarged, on an uncertain event; and differs from a limitation, which is the bounds and compass of an estate, or the time how long an estate shall continue. Condition in a deed may be annexed to things inheritable, to freeholds, or chattels real or personal.

BUT a condition cannot be referred to a stranger, but only to him that makes the estate. The words in a deed that denote the condition, are generally *provisio, ita quod, sub conditione*.

A COVENANT is an agreement of two or more by deed in writing, sealed and delivered, whereby one of the parties doth promise to the other that something shall be done.

ANY one party to the deed to whom the covenant is made may take advantage of the covenant, but not a stranger.

WARRANTY.

A WARRANTY is a covenant real annexed to lands and tenements, whereby a man and his heirs are bound to warrant the same.

THE fruit and effect of a warranty is, that it bars the warrantor for ever, so that his present or future rights which he may have therein are become extinct.

THE words *doni & concessi* only in a feoffment, do make a warranty when an estate of freehold or inheritance do pass by the deed; but the word *warrantizo*, or warrant, is the only apt and express word to make an effectual warranty in fines.

Now we come to the particular assurances by matter of deed; which are, first,

FEOFFMENT.

A FEOFFMENT, which is the *donatio feodi*, or strictly or properly a gift or grant of any manors, lands, tenements, or other corporal immoveable things of the like nature, which be heritable to another in fee simple by livery of seisin and possession of the thing given.

THE most antient forms of these deeds are very brief, but had these parts:

1. PREMISES.

2. HABENDUM.

3. TENENDUM.

4. REDDENDUM.

5. THE cause of warranty.

6. *CUJUS rei testimonium.*

7. THE date.

8. THE clause of *Hinc testibus.*

THIS conveyance is the most antient and excellent, and in some respects preferable to fine and recovery; for it clearth all abatement, disseisin, and intrusions, or other wrongful and defeasible titles.

REQUISITES to a good feoffment are,

1st. THAT it be written, sealed, and delivered, as all other deeds must be.

2d. THE feoffor must be a person able to grant.

3d. THE

3d. THE feoffee must be able to receive.

4th. THE thing must be grantable; and

5th. GRANTED in the manner which the law requires.

WHOEVER is disabled by the common law to take, is disabled to make a feoffment, gift, grant, &c. and many that have the capacity to take, are not enabled to grant.

A FEOFFMENT may be made this day of any thing that lies in livery and seisin, by whatever tenure it be held.

LIVERY of seisin is a solemnity or overt ceremony required by law, and used for the passing of lands or tenements corporeal, as a testimony of the willingness of the parties to give and accept the thing granted; the design of it being, that the country might take notice how lands pass from man to man, and who hath the title thereto, and from whom to take leases, &c. and by this the jury might have less trouble to find out who has the right.

LIVERY in deed is, when the feoffor, donor, &c. doth by himself, or another by his appointment, take the ring or key of the door, or twig or turf of the land, and deliver it to the feoffee, donee, &c. in the name of seisin of the house or land.

LIVERY in law is, when the feoffor, being in view of the land or house, saith to the feoffee, "I give you yonder house or land, to you and your heirs. Go, take possession of it accordingly."

LIVERY of seisin is needful when an estate in fee-simple, in tail for life (or years, with a remainder) doth pass.

As for the making of the livery,

1st. It must be done in the life-time of the feoffor or donor, and of the feoffee, donee, &c.

2d. If it be a lease for years, with remainder over in fee, livery must be made to the lessee for years before his entry, or at the time when he doth enter; for it cannot be made after.

3d. IT must not be made before the estate commences, for then that livery is void. Livery of seisin may be made of any corporeal thing; as manors, lands, meadows, pastures, woods, chambers, or the like.

To every livery of seisin there is needful such an act as the law doth adjudge to be a livery, or apt words that do amount unto it.

OF A GRANT.

GRANT. THIS word largely taken is, when any thing is granted or passed from one to another; and in this sense it is very extensive, comprehending feoffments, bargains and sales, gifts, grants, leases, and the like; but is more strictly and properly taken as a conveyance or gift by writing of such an incorporeal thing as lies not in livery, and cannot be given by word only without deed; or it is the grant of such persons as cannot pass any thing from them but by deed, as the king, bodies corporate, & *similia*.

THE things that pass by grant are such of which no livery doth lie, and are of this sort, viz. rents, reversions, services, advowsons in gross, & *similia*, which things cannot pass from man to man without deed.

IT is requisite in every good grant,

1st. THAT there be a grantor capacitated duly for it.

2d. A DONEE able to receive.

3d. A THING granted, and that it be grantable.

4th. THAT it be granted in the order and manner that the law requires.

5. THAT there be an agreement to, or acceptance of the thing granted by the grantee.

ALL bodies corporate or aggregate of many cannot grant lands, goods, or chattels, but by deed:

DEDI & *concessi* are the most proper words for all kinds of grants; but it may be by other words, and the grant be good.

WHICH,

WHOEVER may be a feoffor may be a grantor ; and any natural, politic, or corporate body may be a grantor, not prohibited by law ; as *feme covert*s, infants, and such like : and all persons who may be grantors may be grantees : and some also who cannot grant or give, may take or receive ; as an infant, *feme covert*, persons attainted of treason, may be grantees.

A GRANT may be void,

1st. FOR uncertainty ; as a grant to two *heredibus*, without *suis*.

2d. WHEN made on a corrupt contract.

3d. IF made to defraud creditors of their debts, or purchaser of his lands.

4th. FOR want of some other matter which ought to be done, as inrollment, attornment, &c.

AND here we will speak a little of attornment.

IT is as the agreement of the tenant to the grant of the feigniory or rent, or the agreement of the donee in tail, or tenant for life or years to the grant of the reversion or remainder made to another ; as when the lord, or one that hath rent out of the land, grant the feigniory or rent to another, or when the reversioner or remainder-man after an estate tail for life or years, sells or gives the reversion or remainder ; in these cases the tenant of the land must have notice of the gift or sale, and of the alteration of the party to whom he must pay his services, and must consent to the same, else generally it is not good.

ATTORN
MENT.

ATTORNMENT is either actual or verbal ; of which examples will enure.

THE end and fruit of this attornment is to perfect a grant, and no rent or reversion will pass without it ; neither can the grantee of the feigniory, or rent, bring an action of waste for any waste done in the land, nor distrain for any rent or service upon that land before this is done : but this attornment, being but a bare assent, will not enure

to pass any interest to make a bad grant good, nor to give a man a tenancy by disseisin, abatement, intrusion, &c. nor will it work by way of estoppel, but it doth effectually pass the freehold and inheritance of the reversion of land when the grant is good, as a feoffment and livery and seisin do pass the possession of land: but a tenant may sometimes be compelled to attorn, as consuee upon a fine may do it by a *per quæ servitia, quem redditu reddit, or quid juris clamat*, as the variety of different cases may require.

THE attornment must always be made to the grantee himself, and it must regularly be made in the life-time of the grantor and grantee; else, generally, if either die before, the grant is void.

1st. THAT it be made by the person who ought to make it.

2d. THAT it be made to the person who ought to take it.

3d. THAT it must be in convenient time,

4th. THE tenant must usually first have notice of the grant.

5th. IT must be done in the manner the law prescribes.

IT may be by words or deeds, with writing or without; and any words writ or spoke by the tenant that do import an assent to the grant after notice given, whether in presence or absence of the grantee, will make a good attornment. As to say, "I do attorn or become tenant to the grantee," or, "I agree to the grant," *aut similia*: or if tenant after knowing of the grant do pay or deliver all or any part of his rent or service at any time when the same is due to the grantee, or give any valuable thing in the name of attornment or seisin of the rent, this is a good express attornment. If the grant be made to several, and the tenant do attorn to one of them, this is good to all the rest.

A GIFT imports no more than the transferring of the property of the thing from one to another; and it differs from feoffments, bargains and sales, & *similia*, because they are for many or other valuable considerations; but this is mere free will of the party donor; and so this may be called a conveyance, or passing an estate of lands or tenements to another in tail, and whereon the word *dedi* is most commonly used*.

OF BARGAIN AND SALE.

THE term signifies the transferring of a property from one to another for valuable consideration; and when it is applied to lands, tenements, or hereditaments, it is called a deed of bargain and sale.

THE effect of it is to transfer the property of the thing sold from the bargainor to the bargainee, and this it will as effectually do as any kind of conveyance; all things grantable any other way may be transferred by this, except estovers & *similia*.

* OPINION of Sir JEFFERY PALMER on the Effect of the Words
"Give and Grant."

"I CONCEIVE that care ought to be taken in a conveyance, of what nature soever it be, that there be not therein the words *given* and *granted* (for they imply a general warranty, and shall not be qualified by special warranty following), as hath been of late thrice adjudged.

"GIVE implies a personal warranty, and so is not always used; the word *grant* in a lease for years is a covenant in law, & (as you may call it) a general warranty; if not qualified by a covenant or warranty in fact, then it is restrained to the words of the covenant subsequent.

"BUT in an estate of inheritance where the fee passeth, there the word *grant* is neither a covenant in law nor warranty; for if it should be a covenant in law or warranty in itself, it would be there restrained and qualified by the warranty or covenant in fact.

"AND a deed to pass an inheritance where common law cannot be without it; for if it be common in gross it cannot pass by the livery, but must pass by the word *grant*, and I never yet saw a feoffment without it.

"JEFFERY PALMER."

IF an estate of freehold or inheritance is made of land by way of bargain and sale, it must be made by writing, or deed indented, and cannot be made by word of mouth only.

THE words *bargain and sale* are not necessary to a bargain and sale, but words equivalent will do.

A VALUABLE consideration must be given, at least said to be given, for the land; but livery and seisin, or attornment, is not needful; but when a freehold passes, the deed must be inrolled: and here observe,

1st. THAT an inrollment of such a deed to make estate pass, must be on parchment.

2d. THE deed inrolled must be indented, for it will not pass by deed poll.

3d. IT must be inrolled within six months after the purchase or sale, and this account to be,

(1.) FROM the deed's date and not from the delivery of the deed.

(2.) AFTER the rate of twenty-eight days to the month, and no more.

(3.) THE day of the date to be taken exclusive, and for none of the days of the six months.

4th. IF it be inrolled any part of the last day of the six months, it is sufficient,

LEASE.

A LEASE properly signifies a demise or letting of land, rent, or any hereditament to another for a less term than he who lets it hath in it; for when lessee for life or years grants over all his estate or term to another, this is more properly called an assignment than a lease. A lease is most commonly made by the words *demise*, *grant*, and *let*, though it may be made by others that are equivalent; and is most frequently made by writing in an indenture; and it may be for life of lessee or another, or both, or for a term of years.

1st. A LESSOR capacitated by law, and not forced to make the lease by duress, or the like

2d, A LES-

2d. A LESSEE not disabled to receive it.

3d. A DEMISED thing that is demisable.

4th. IF the thing demised be not grantable without deed, as rents, &c. and the person who lets it is not able to grant without deed, as bodies corporate & *similia*, then it must be done by deed.

5th. IF it be a lease for years, it must have a certain commencement and a certain express determination.

6th. ALL needful ceremonies must be performed, as livery of seisin, attornment, &c. when the case requires.

7th. ACCEPTANCE of thing demised by the lessee.

LEASES for lives, years, or at will, may be made of any thing corporeal or incorporeal, that lies in livery or grant; and leases for years may be made of any goods or chattels.

TENANT in tail may make leases for three lives, or twenty-one years, but these conditions must be observed;

1st. SUCH lease must be made by indenture, and not by deed poll or parol.

2d. To begin from the day of making thereof, or to begin at Michaelmas next, & *similia*.

3d. IF an old lease of the land is in being, that must be surrendered or expired within one year of the time of making the new lease.

4th. THERE must not be a double or concurrent lease in being at the same time; as if a lease for four years be duly made, the reversioner cannot oust the lessee and make a new lease for life, &c.

5th. THESE leases must not exceed three lives, or twenty-one years from the time of making the same.

6th. THEY must be of lands, tenements, or hereditaments, manurable or corporeal, which are proper to be let, and whereout a rent by law may be issued and received,

7th. OF

7th. OF land most commonly let to farm, or occupied by the farmers thereof for twenty years next before the lease made.

8th. THERE shall be reserved on such leases yearly, during the same lease, so much yearly rent as hath been accustomedly paid for the lands, and payable to the lessor and his heirs to whom the reversion shall belong.

9th. THEY must not be without impeachment of waste.

10th. THEY must not be against a special act of parliament.

11th. THEY must have all due ceremonies and circumstances for the perfection of them, as livery of seisin, &c.

ALL ecclesiastical bodies aggregate of many may not make leases of their lands for more than three lives, or twenty-one years.

EXCHANGE. EXCHANGE is a mutual grant of equal interest the one for the other, and is when two persons are possessed of an equal estate, and give the one for the other; in which there is a double grant; for each grants that which is his for the other.

THIS conveyance is made by writing or without, but either way must be made by this word *exchange*, which is so appropriated to the thing that it cannot be described by any other.

THE effect of it is to give the interest or property of the thing exchanged to either party, according to agreement.

IF the exchange be of lands or tenements of any estate of inheritance or freehold by word or declaration, it hath a condition or warranty in law incident and annexed to it, viz. a condition to give an entry upon all the lands given in exchange, and a warranty to enable either party to vouch and recover in value so much of his own land again given in exchange, if he be put out of all or part of the land taken in exchange; yet this

this remedy goes only in privity, and shall not go to a stranger,

THESE things are requisite to the perfection of an exchange:

1st. THAT the parties be able to give and take: such, who may be grantors and grantees may make an exchange.

2d. THE thing exchanged may be such whereof an exchange may be made of things of the same nature, as a temporal thing for a temporal, a spiritual for a spiritual, a house for a house, land for land, &c.; and things of a different nature, as a house for land or rent, a chamber in a house for common or rent, &c.

3d. THE exchange must be in that order and manner as the law requires; and here note,

(1.) THAT if all or part of the thing whereof the exchange is made do lie in several counties, or lies in grant and not in livery, though in the same county, the exchange must be made by deed indented or writing.

(2.) THE word *exchange* must be had and used between the parties making the exchange.

(3.) IF any rent, reversion, seignory, or the like, be granted by either party, the tenant must attorn to the grant.

4th. EQUALITY of the estate is necessary for either party to have alike kind of estate; so that if one's estate be in fee and the other in tail, &c. these exchanges are void,

5th. THE exchange must be executed and perfected by entry or claim in the life-time of the parties.

A SURRENDER, properly taken, is the yielding and delivering up of lands or tenements, and the estate a man hath therein, to another that hath a higher and greater estate therein.

1st. EXPRESS, or in deed; which is, when it is done by apt words and the express agreement of the parties.

2d, IN

2d. IN law, or implied; which is, when it is wrought by consequence and operation of law, or when the law doth interpret somewhat done to another intent, to enure to make a surrender of it.

IN the first case it is by word only, or in writing; and when it is by writing it is called an Instrument, testifying by apt words that the particular tenant of the freehold lands or tenements for life or years do agree, that he that hath the next immediate remainder or reversion thereof shall have the particular estate in possession, and that he yield the same to him.

THE effect of a surrender is, that it passeth by the estate of the surrenderor to the surrenderee, and that hereon the estate of the surrenderor to the surrenderee is drowned and extinct in the estate of the surrenderee.

A SURRENDER in law is, when a lessee for life or years takes a new lease of the reversioner of the same thing in particular contained in the lease for life or years, this is a surrender in law of the first lease.

1st. THAT the surrenderor be a person able to grant and make, and the surrenderee capable to receive a surrender, and that both have estates capable of a surrender; and for this purpose,

(1.) THAT the surrenderor must have an estate in possession of the thing surrendered at the time of the surrender made,

(2.) THE surrender must be to him who hath the next immediate estate in remainder or reversion.

(3.) THAT there be privity of estate between surrenderor and surrenderee.

(4.) THAT the surrenderee have a higher and greater estate in the thing surrendered than the surrenderor hath,

(5.) THAT he hath the estate in his own right and not in his wife's,

(6.) THAT.

(6.) THAT he be sole seised of the estate in remainder or reversion, and not in joint tenancy.

2d. THAT if it be made by word without writing, that it be made in the same county where the land to be surrendered doth lie.

3d. THAT it be made of such things whereof a surrender may be made; for a surrender cannot be made of lands in fee-simple, tail, nor of rights nor titles, but only of estates for life or years.

4th. THAT there be words, or deeds and words, sufficient to make the mind of the surrenderor known, and that he is willing to give up the estate to the surrenderee. And note, that the words *surrender, give and grant, &c.* are the most significant and proper words whereby to make a surrender; yet any other that do sufficiently declare the will and assent of the surrenderor will do.

5th. THE surrenderee must agree to accept of it, for till then the surrender is not perfect.

IF any kind of tenant for life enfeoffs the remainderman, or the reversioner of the land that shall enure as a surrender; or if lessee for life or years grants his estate to the reversioner or remainderman; and a stranger, that shall enure as a surrender for two, and a grant of the other; or if tenant for life or years, and reversion or remainderman, by word, without deed, join in a feoffment, it is the surrender of the tenant for life or years, and the feoffment of the reversioner or remainderman.

THERE may be also a surrender of a rent in fee-simple for life or years, issuing out of another man's manor or lands; and it may be done by delivering the deed of the grant of the rent to be cancelled, to any one that hath an estate of the manor or lands in fee-simple for life or years in possession or remainder, and whereby the estate is extinct and gone.

CONFIRMATION.

A CONFIRMATION is a conveyance of an estate or right that one hath unto lands or tenements, to another who hath possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged. This conveyance is most commonly or properly made by the words *confirm, ratify, and approve*; though it may be done by other words that are equivalent, as *dedi & concessi, & similia*.

CONFIRMATIONS are,

1st. IMPLIED, or in law; which is, when the law makes a construction of a deed made for another purpose to be a confirmation.

2d. IN deed, or express; which is, when the act done or deed made is intended for a confirmation; and both these must be in writing; and the latter is properly called a confirmation.

A CONFIRMATION may be distinguished likewise by its effects. Sometimes it serves to make good a wrongful or defeasible estate, or to make a conditional one absolute, and then it is *confirmatio perficiens*: sometimes it serves to increase or enlarge a rightful estate, and so palleth an interest, and it is called *confirmatio crescens*: sometimes it serves to diminish and abridge the services whereby the tenant doth hold, then it is called *confirmatio diminuens*.

THE operation of it, where it finds a foundation to work upon, is either to increase and enlarge the estate of him to whom it is made from a less to a greater, or to corroborate and perfect the estate upon condition to an absolute estate that was imperfect before, or change the quality of it from an estate upon condition to an absolute estate, or to extinguish rights and titles of entry, but will not make an estate good that is merely void.

THERE is requisite to every good confirmation tending to confirm an estate or alter its quality, that,

1st. THERE must be good and capable parties, and a thing

thing to be confirmed, as in other grants and deeds, and the deed must be well sealed, &c.

2d. THERE must be a precedent rightful or wrongful estate in him to whom the confirmation is made; at least he must have possession of the thing confirmed, else there is no foundation for the confirmation to work upon.

3d. THE confirmer must have such an estate and property in the thing whereof the confirmation is made, as that he may be thereby enabled to confirm the estate, else the confirmation is void; as if the heir of disseisee during the life of disseisee confirm to the disseisor, this is no confirmation.

4th. THE precedent estate must continue till the confirmation is come; as in all cases of voidable estates the confirmation must be before the estate be made void by entry.

5th. THE estate precedent, and that which is to be confirmed, must be lawful, and not prohibited by any act of parliament; therefore if a spiritual person make a lease not warranted by the statutes, as prebend or the like, the confirmation of the dean and chapter will not help to amend it.

6th. THERE must be apt words in the deed or instrument the most proper for the purpose, as before mentioned.

CONFIRMATIO *crescens* must have the requisites of the former, but there must be also in that case a privity between the confirmer and the confirmee: there needs no new rules for the *confirmatio diminuens*.

OF RELEASE.

A RELEASE is the giving or discharging of the right of action which a man hath or may have or claim against another, or that which is this; or it is the conveyance of a man's interest or right which he hath to a thing to another that hath possession thereof, or some estate therein.

THE

THE words most proper and frequently used in this conveyance are, *remisi, relaxavi, and quoniam clamavi.*

A RELEASE is express, or in deed, which is a purposed release; which is, when the act done or deed made is intended a release; and this is always done by writing; and then is defined by some an instrument, whereby estates, rights, titles, actions, &c. be extinguished, transferred, abridged, or enlarged.

A RELEASE implied, or in law, is, when the law by construction and by way of consequence makes a release of an act done to another purpose.

A RELEASE is much of the nature of a confirmation, for in most things they agree and produce the like effect.

A RELEASE enures sometimes by way of *mitter le estate, (i. e.)* giving, transferring, or discharging a right, title, or entry to him to whom it is made: so it perfects an estate that was imperfect before, and sometimes makes a conditional estate absolute,

BY way of extinguishment:

• BY way of abridgement.

LANDS, tenements, and hereditaments may be given and transferred by way of release, and all rights and titles to lands may be given, bound, and discharged, by release; so may rights and titles to lands, goods, and chattels, and all actions real, personal, and mixed, be given, discharged, and extinct by release, provided,

1st. THAT the parties be capacitated and the thing qualified duly that is to be released.

2d. THAT the deed be well sealed and delivered, &c.

IF the release enure by way of enlarging the estate, then it is requisite,

1st. THAT he who makes it have at the time of the release made, such an estate in himself as out of it such an estate may be derived to the releasee as is intended by the release.

2d. IN case of a release of a bare right of a freehold in the land, the releasee must, at the time of making it, have
the

the freehold in deed or in law in possession, or some estate in remainder or reversion in deed, and not in right only in fee simple, tail, or for life, of the land released.

3d. THERE generally needs no priority to make the estate good, in case of a release of a bare right to him who hath a freehold estate in deed or in law.

4th. WORDS that enure to make a good release that enures by way of enlarging, will make a good one in these cases;

NATURE OF A DEVISE OR TESTAMENT.

A TESTAMENT is a full and complete declaration of a man's mind; or last will, of what he would have to be done after his death. A testament is, properly, when an executor is named in it; but when there is no executor, then it is a codicil; and a man can make but one testament that shall take effect; but he may make as many codicils as he will.

DEVISE OR
TESTAMENT.
Shep. Touch.
399.

TESTAMENTS are in writing, or by word without writing. The first is what the testator by himself, or some other by his appointment, puts in writing; the latter is when a man, being very ill, is obliged to call a friend or neighbour to bear witness of his last will, and then he presently declares the same before them; this is called a nuncupative or nuncupatory will.

EVERY complete testament hath two parts:

1st. THE making devises, or giving legacies.:

2d. THE ordaining an executor; for a testament can be no more without, than a codicil can be with, an executor.

A DEVISE or legacy is, when a man in his testament doth give any thing to another: the first is applied to the gift of lands; the last, to the gift of goods or chattels.

AN executor in a large sense is taken for any one that is appointed to have the disposition and ordering the goods of the deceased:

THERE are three kinds of executors:

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1st. A

1st. A *LEGE constitutus*. Such is the ordinary of the diocese, who hath ordinary jurisdiction in matters ecclesiastical.

2d. A *TESTATORE constitutus*; heretofore called *testamentarius*. He is strictly and properly an executor.

3d. *Ab episcopo constitutus*; and he is called *datarius*. Such a one is an administrator, who hath the goods and chattels of a man dying intestate committed to his charge by the ordinary; and his power, benefit, and charge, is in all things equal to an executor.

A TESTAMENT differs much from other acts and deeds which men do and execute in their life-time; for though it be made, sealed, and published, in never so solemn a manner, yet it hath no life nor virtue till the testator's death; therefore a man may alter and make void his will as often as he will, and may make as many testaments as he will, but the latter always revokes the former: otherwise of a codicil, for one may make as many of these as he will, and no testament at all: or if he makes a testament, he may still make as many of these as he will, and not overthrow the one of the other; for in the first case they must be annexed to the letters of administration, and the administrator must perform them; and in the latter they must be all annexed to the testament, and the executor must perform them.

1st. A FEME covert, unless in special cases, cannot make a testament:

2d. NOR an infant under the age of twenty-one years of his lands; but of his goods and chattels he may make a testament at fourteen, and not before. *A.* is born the first of February; and the last of January at one o'clock in the morning, twenty-one years of age, makes his will of land; it is a good will, for he was then of age, *per Holt.*

1. Salk. 44.

3d. NOR a lunatic nor a madman during infancy of mind,

4th. NOR

4th. NOR an idiot, nor deaf or dumb person.

5th. A TRAITOR or felon attainted or convicted cannot make a testament of their lands or goods, because they are forfeited to the king:

NOR an outlawed person, so long as his outlawry stands in force.

2d. HE who makes it must, at the time of making it, have *animus testandi*, (i. e.) a firm resolution and advised determination to make a testament; otherwise the testament will be void.

3d. THAT the testator's mind in making it be free, and not moved by fear, fraud, or flattery.

4th. THAT the form and order prescribed by the law be observed in the disposition.

AND therefore note,

1st. THAT there be an executor named, and that he be capable of the executorship.

2d. IF it be of land, it must be in writing; and it must be committed in writing at the time of making thereof, and not after the testator's death.

3d. LANDS devisable by custom, and goods and chattels, may be disposed of by words without writing.

4th. IT is no matter on what paper or parchment, or in what language it is made.

5th. WHERE writing is needful, the sealing the testament, or subscribing the testator's name, is not necessary.

6th. IF the testator be taken off by sudden death in the middle of making his will, it seems, the whole will is void.

7th. IF the testament be good in all its requisites, it must be proved for all; and if it cannot by proof be made appear that it is the testator's testament, it is void.

AND therefore note,

1st. THAT a nuncupative will must be proved by two witnesses at least.

2d. A WRITTEN testament, if written by the testator's hand, proves itself without the help of witnesses.

3d. IF it be proved the testator said his testament was in such a schedule in the hands of J. S. and said J. S. produce a writing deposing it to be the same, this is a sufficient proof.

4th. IF the witness produced proves the writing produced to be the last will, or that he said it was or should be his last will, that is sufficient proof.

5th. ALL persons of any sex or quality are competent witnesses to a will, if they be not infamous or perjured.

6th. WHERE there is no opposition or question moved against the testator, the executor's oath alone is sufficient proof.

A TESTAMENT good in creation may be void by divers means.

1st. BY countermand, or revocation: and for that observe, that any act or thing done, or words spoken by the testator, after testament made, that doth alter or cross all or any part of his testament made before, is a revocation made of it, or at least of that part so crossed or altered: but when a testator makes two testaments, a former and a latter, both in writing, though the latter doth generally revoke the former, yet in these following cases it doth not:

(1.) WHEN the latter is imperfect as to the fore-mentioned requisites.

(2.) WHEN the testator having made two testaments in writing, and both are presented to him on his death-bed, and delivers the former to some of the standers-by to be his last will and testament.

(3.) WHEN the latter doth in all things agree with the former.

(4.) WHEN in the latter there is no executor named, for then it is esteemed but as a codicil or addition to the former.

2d. BY

2d. BY cancelling; or other destruction of it; as when the testator himself, or some other by his appointment, cuts it in pieces, tears, or burns it.

3d. BY alteration of the testator's estate, and when the testator after making it is convicted of treason or felony.

4th. BY intention; as when the testator on his death-bed hath a mind to alter it, but his wife and some other will not suffer the notary and witness to come unto him.

5th. BY making another of the same date, for it cannot be proved which of them was made first; the one will overthrow the other.

6th. BY the declaration of the testator's mind; as if he have them by him, and declare the first shall stand.

THE summary of the requisites to render a testament good in creation are, therefore, as follow;

1. THAT there be a devisor duly capacitated.
2. A DEVISEE capable to receive.
3. THAT the devisor have, at the time of the devise made, *animus testandi*, and a mind to devise.
4. THAT the devisor be free, and not drawn by fraud or flattery.
5. THAT the thing devised be devisable.
6. THAT the devise be in due form and manner.
7. THAT it be devised on lawful terms and conditions.
8. THAT there be words sufficient to make his mind known.
9. THAT it be proved after the person's death.

THE executor before probate may release and dispose of the goods of his testator, and may bring actions and be sued; but the will must be proved before he declares: he may receive and pay money, and it shall be good, though he dies before probate; and as all the testator's goods are in his actual possession, he may maintain trover. 1. Salk. 307.

AN ANALYSIS OF THE THEORY

10. IF it be a devise of lands, the devisor must be sole seised of the land, and not joined with another.

As to these requisites, note,

1st. THAT whoever may make a testament may make a devise; and so who cannot do the one cannot do the other.

2d. NOTE (1.) That, regularly, whoever may be a grantee may be a devisee, or legatee.

(2.) IF the devisee be capable to receive, he must certainly be named or described.

3d. THAT devisee must be capable by that name by which the devise is made to him; so if the devise be made to the heirs of J. S. J. S. being then alive, the devise is void.

4th. IF the name be mistaken the devise is void.

5th. NOTE (1.) That lands devisable by custom may be devised by a nuncupative will.

(2.) THE form of words in a devise is not regarded; so that "I say, I give, institute, and appoint or will, that J. S. shall have my lands," is as good as "demise my land to J. S."

(3.) A MAN may devise lands and tenements in fee-simple, for a term of years.

(4.) A DEVISE may be of lands, goods, or chattels, simply and absolutely, or conditionally.

(5.) A DEVISE may be also by a limitation.

(6.) ONE seised of lands in fee-simple may devise that his executors may sell it.

(7.) RENT may be devised, or land reserving rent, with clause of distress.

(8.) A MAN may devise his lands to one, and a rent out of the same to another.

(9.) A MAN may devise his lands for so many years as J. S. shall name.

(10.) A MAN may devise a term of years by way of remainder.

(11.) A

(II.) A LEGACY of goods or chattels may be given to, from, or until a certain time. Note,

1st. THAT lands, tenements, or hereditaments, for the nature and quality of them, are devisable as well as other things; but estates in fee were not so till 32. H. 8. which enabled the owners of lands held in soccage to devise all the lands; and those lands that are held by knight's service, the owners may devise two parts in three.

2d. IT doth not enable such persons to devise that are disabled by law, either in respect of their persons or mind.

3d. HEREDITAMENTS that are not of any yearly value, some of them are devisable and some not; as if the king grants to one and his heirs fines and amercements in such a manor and vill, in this case the owners cannot devise these things; but if one have a manor to which a waife, estray, leet, or the like, is appendant, there by the devise of the manor with the appurtenances they may pass.

4th. SUCH uncertain franchises as before as are of no yearly value, though they are not devisable, yet may restrain the devise of a man's land, and make it voidable for one-third part, if they be held *in capite*.

5th. IN all cases where a man is restrained to devise any part of the land in soccage, he must have land held *in capite* at the same time.

6th. THE testator must have a sole estate, as well in the lands he leaves to descend to the heir, as in the lands he deviseth.

7th. THE estate of the land that is held must continue after death of tenant.

8th. THAT which a man cannot dispose of by any act in his life-time, shall not be taken for any such manor, &c. whereof a man may devise two parts by authority of statute at his death.

9th. THE tenant by knight's service must continue after testator's death.

10th. THE king or other lord must have a full and clear yearly value of the one-third left to descend,

11th. THE one-third left to descend to satisfy the king or other lord, must descend immediately, and he must not stay for it,

12th. THE one-third must be taken out of the testator's lands indifferently.

13th. A MAN must have a right and possession of the land he deviseeth, or the devise is not good.

14th. A SEIGNIORY, rent, or the like, is devisable as well as land.

15th. WHEN a man seised of a house in fee deviseeth that, he likewise deviseeth the incidents to it, unless excepted, as windows, doors, wainscot, and the like,

16th. WHERE a man hath waste that remains at common law, he may devise that as well as any other thing.

17th. ALL manner of goods and chattels, real and personal, may be devised by will.

18th. THINGS in action, debts, and the like, are devisable by will.

19th. EMBLEMENTS, (*i. e.*) corn sown and growing on the man's ground at the time of his death, and which himself should have reaped had he lived to harvest, are devisable.

20th. OBLIGATIONS and counterparts of leases are devisable.

21st. GOODS and chattels which a man hath jointly with another, are not devisable.

22d. ALL things before devisable must be named when they are devised, else the devise is void.

As to terms and conditions of a devise, note, that if one devise any thing to wicked ends and purposes, or on wicked conditions, as to the end the devisee should kill a man, or the like, these are void. As to the rest of the property of a good devise, see them before in the property of a good testament.

BUT

BUT if a man would settle his lands by devise, let him do it in his perfect memory; and by learned advice let the will be indented, and of two parts, and let him have one with a friend, that it be not suppressed after his death; let there be credible witnesses to it; let the whole will be written in one hand, and on one piece of paper or parchment, for fear of alteration; let the hand and seal of the devisor be set to it; and if it be in several parts, let his hand and seal, and the names of the witnesses, be to every part; and if there be any railing or interlining, let there be a memorandum of it.

THE general rules for the explanation of wills are these:

RULES FOR EX-
PLANATION
OF WILLS.

THEY must have a favourable interpretation, and as near to the mind and intent of the testator as possible, so that it be not repugnant to law; as if lands are devised to one and his heirs female, they shall take it. Whatsoever words will pass in a deed will pass by the same words in a will, and the same words that will make a condition in a deed will make the same in a will. When any chattels, real or personal, are given to an executor by a will, the executor has an election given him by law to have or take it in the right of a legatee or as an executor.

ORDINARY cannot refuse probate to an executor because he is an absconding person, for the testator has trusted him; nor can he insist on security, for he has a temporal right which he cannot sue for before probate, 1, Salk. 299.

WHEN a devise of goods or chattels is well made, the assent of the executor is necessary to the perfection thereof; for till then the legatee may not meddle with the thing devised; but the agreement of the executor or administrator is not necessary in a devise of lands; and if there be many executors, the assent of any one is sufficient.

AN ANALYSIS OF THE THEORY

A PERSON that may make a testament, or devise his goods and chattels, may make an executor; and any person that may be a devisee or legatee may be an executor: but if an infant be made an executor, he cannot meddle with the administration of the goods till he be seventeen years of age.

A PERSON *non compos* cannot be an executor or administrator. An administrator becomes bankrupt; administration may be revoked, but administration shall not be granted to another, though the executor becomes bankrupt. 1. Salk. 36. 39.

THE most proper words to constitute and appoint an executor are, "I make J. S. my executor, or the executor of my will, &c." but an executor may be constituted by other words, or by implication; as if a man say, that he wills J. S. to be his general administrator, or administrator of all his goods and effects.

IN all cases where a man has any goods or chattels to administer, and he dies a natural or civil death, or dies intestate, *i. e.* dies either making no will or not appointing an executor, or a person capacitated to be an executor (yet administration shall be granted generally, and not *de bonis non cum testamento*, &c.), or dies before probate, or refuse administration; in all these cases, the ordinary may and ought to grant administration of the goods and chattels of the deceased to whom of right it does belong, according to his discretion.

IF an executor intermeddle and die before probate, though he make an executor, yet administration shall be granted generally, and not *de bonis non cum testamento annexo* of the first testator; but if he proves the will and after dies intestate, administration shall be granted *de bonis non*. 1. Salk. 99.

ADMINISTRATION.

ADMINISTRATION is to be granted by the ordinary of the diocese where the party died; or, *sede vacante*, the dean and chapter, being guardians of the spiritualties; or if

if the deceased have *bona notabilia* at the time of his death, (*i. e.*) goods and chattels above five pounds in another diocese, in this case the metropolitan or archbishop of the diocese where the party died, and not the ordinary of the peculiar diocese, may grant the administration. A peculiar has a right to grant administration, and there is no peculiar but what has an ordinary. 1. Salk. 40.

A MAN dies intestate without kindred; king grants administration: this is allowed as a respect shewn the king; but the ordinary has a right to dispose to pious uses; and Henloe's case denied to be law. 1. Salk. 37.

IF a man has two houses, the one in Canterbury, the other in York, but lives mostly at the one and but sometimes at the latter, he dies at the latter after a day or two stay, administration must be in the latter. 1. Salk. 37.

BONA notabilia in two dioceses, administration is by both the bishops, and not a prerogative administration; but if there be *bona notabilia* in two dioceses in *C.* and two in *D.* there must be a prerogative administration in both. 1. Salk. 39.

ADMINISTRATION granted in a wrong diocese is not void, but voidable; and the acts of such administration and disposal of goods after citation till repeal, is good. 1. Salk. 38.

ADMINISTRATION must be granted by writing under seal, and cannot be granted by word of mouth. If an executor die after he has proved the will, and made a testament, and therein appointed an executor, that executor shall be an executor to the first testator.

IF an executor or administrator die before probate, though he makes an executor, yet administration shall be granted generally *de bonis non*; yet the acts of the first executor are good. If first executor dies intestate after probate, administration shall be granted *de bonis non*. 1. Salk. 209.

AN executor or administrator may refuse the executorship or administration at his pleasure at any time before he has intermeddled with the estate of the deceased; and if he be sued as executor, he may answer, *ne unques executor*.

AN executor cannot waive a term, for he must renounce the executorship *in toto* or not at all. 1. Salk. 297.

If there be many executors, and one refuse, but the rest prove the will, the refusing executor may act afterwards if he will, and in any action with the rest he may be named executor; he may release a debt; and if he survives, no administration can be granted till he has again refused. 1. Salk. 307.

If an executor once intermeddles, he cannot afterwards refuse it. Two executors; the one proves the will, action brought in both their names. *Per Curiam*, He that did not prove may come in if he will, but cannot refuse during the life of his companion.

THE executor or administrator shall have, by virtue of their office, all the chattels real and personal of the testator, as well those that are in possession as leases for years of land, rent, common, *aut similia*, grants of next advowsons, presentations, wardships, infants, &c. corn growing and cut, trees and grass cut, and cattle, money, plate, household stuff, & *similia*; as also things in action, as right and interest of executions upon judgments, statutes, obligations, causes of actions, & *similia*; and divers other things are said to be assets in their hands.

OFFICE OF EXECUTOR AND ADMINISTRATOR.
Touch.
276.

THE duty and office of an executor or administrator in general, is to dispose of all the estate of the deceased where-with he hath to do:

1. TRULY, that is, not to convert any of it to his own use, but to the best advantage of the deceased; nor to labour by undue practices to hinder a creditor of his debt.

2. **LAWFULLY;** to pay debts and legacies in that manner the law requires.

3. **DILIGENTLY;** but particularly,

1. **THE** first thing an executor or administrator is to do after he has taken upon him the charge of administration is, after the goods of the deceased are laid up, to see his body interred according to his rank and quality; but they should be very careful not to exceed in funeral pomp, especially if the estate will scarcely reach to pay the debts; for be their expences what they will, the judges (who are to determine what should be allowed) allow in such cases a small matter; and what they lay out more they must bear themselves.

As *per* Holt, For strictness, no funeral expences are allowable against a creditor, except for cost in ringing the bell, parson, clerk, and bearers fees, but not for pall or ornaments. 1. Salk. 196.

2. He must make an inventory or schedule, containing a true and perfect description of all the goods and chattels of the deceased at the time of his decease.

3. To prove the will, if any.

4. To sell and make money of the goods and chattels, and receive the debts due to the deceased, and then to pay the debts and legacies; wherein they must be very cautious: and therefore observe, that all debts must be discharged before any legacy; and if there be not enough for both, any thing that is left for a legacy may be sold to pay debts, and the legatees can have no remedy. And in the paying of debts this direction must be observed:

AMONG persons that are creditors, the executor and administrator shall be preferred, who may first deduct their own debts.

• **HOLT.** If administration shall be committed to a creditor, and after repealed by next of kin, he shall retain against the rightful administrator. 1. Salk. 38.

2. **AFTER** them the king is to be preferred; and then,

3. **DEBTS**

3. DEBTS of common persons must be paid as follows:

1. THE debts due by record by any judgment had against the deceased in any judicial proceedings in any court of record.

To *scire facias* on a judgment defendant pleads *plene administravit*, not good on special demurrer, for against a judgment he ought to shew, how he administered. 1. Salk, 296.

If an executor confess judgment, &c. pending another action, and do not plead that judgment, this is a confession of assets, and he is for ever estopped to say the contrary; as also is a jury. 1. Salk. 310.

DEBT on judgment against an executor: this is no waiver of the lien, and does not postpone it to other judgments. 1. Salk. 80.

2. DEBTS due by statutes, and recognizances entered into by deceased.

3. DEBTS due by obligations, and penal and simple bills.

4. DEBTS due for rent upon leases of land, *aut finilla*.

RENTS, whether created by parol or deed, are equal to one another, but not superior to debt by specialty, as bonds, &c. though equal; therefore an executor may plead payment of another against another, but in debt for rent he cannot plead that this is a bond debt, nor *vice versa*. 1. Salk. 326.

5. DEBTS due for servants wages or workmen.

6. DEBTS due on shop-books or verbal contracts; and among debts that are due and already to be paid, those that are first sued are to be first paid.

THE executor or administrator is to make an account: wherein, note, that the ordinary may, if he will, call the executor or administrator to an account concerning the goods and chattels of the deceased.

AN executor or administrator regularly shall charge others of any debts or duty due to the deceased, as the deceased

ceased himself might have done, and the same action the deceased might have had, the same for the most part the executor or administrator may have. But they cannot charge any one for a personal wrong done to the testator, for which damages only are to be recovered, as for beating or wounding the deceased, *aut similia*; for *actio personalis moritur cum persona*.

EXECUTOR brings error to reverse an attainder of high treason. Holt doubted; but the other three *contra*; the executor being privy, therefore good. 1. Salk. 295.

AN executor or administrator shall be charged by others as the deceased might have been in his life-time.

ALL the executors, though there be never so many, are in the eye of the law as one man, in which respect the law esteems things as done by or to them all; as payment of a debt to one, sale or gift to another, &c.

If there be many executors, and the one refuse and the rest prove the will, the executor that refused may act afterwards if he will; and if he be a debtor to his testator, the debt is extinguished notwithstanding his refusal; and if he survive the rest, he may then act, and he may release any debt. 1. Salk. 307.

Two executors; one proves the will; action brought in both their names as executors: Resolved, both have a right in them; and he that did not prove may come in when he pleases, but cannot refuse during the life of his companion.

A *NEVASTAVIT* in an executor or administrator, is when they misemploy the estate of the deceased, or misde-mean themselves in the management thereof against the trust reposed in them. And it may be done divers ways;

1. BY bestowing too much on the funeral of the deceased. 1. Salk. 296.

2. BY paying legacies before the debts are discharged, and so there do not remain enough for the debts.

3. BY

AN ANALYSIS OF THE THEORY

3. BY not paying the debts in the manner and order above prescribed:

4. BY releasing a debt due to the deceased.

5. BY selling the deceased's goods much under value, especially when it is to any relations, or for money, underhand: this is said to be waste in an executor or administrator; and when it is discovered, it renders them chargeable *de bonis propriis* for as much as is misemployed or wasted; but one executor or administrator shall not be charged for the waste of another.

COVENANT to repair against an administrator: this is a covenant that runs with the lands, and binds the assignees; and the executor may be charged as *terre-tenant*, as in waste; and when he answers as assignee, judgment must be *de bonis propriis*; but when as executor, though in his time, it is *de bonis testatoris*. 1: Salk. 309.

AN executor of his own wrong, is one who is neither lawful executor nor administrator; but that takes upon him to act as executor or administrator; as by the taking the goods of the deceased into his own possession, giving and selling them, and paying the deceased's debts; &c.

A MAN may make himself such a one;

1. BY proving the will with the deceased's money.

2. BY seizing, gaining, and keeping the deceased's goods as his own.

3. BY delivering the goods of the deceased in satisfaction of theirs, or by selling the deceased's goods to pay his debts.

4. BY receiving any debt due to the deceased.

5. BY releasing any debt due to the deceased.

6. BY delivering any legacies.

7. BY suing as executors for any debts due to the deceased.

8. BY selling the deceased's lands.

AND for as much as such an executor of his own wrong hath misemployed the deceased's goods, for so much is he chargeable, and no more.

ADMI-

ADMINISTRATION *durante minoritate* is, in case where an infant, under the age of seventeen years, is made an executor, and administration of the goods is committed to one or more of the next friends or friend during his minority, till he be seventeen years of age.

ADMINISTRATION *durante, &c.* of an administrator may act till the administrator be of the age of twenty-one, otherwise of administration *durante, &c.* of an executor, for there the executor may act as such at seventeen. 1. Salk. 39.

ADMINISTRATION *durante absentia* *J. S.* executor, or *pendente lite* good, but it must be beyond sea, and plaintiff must aver absence. 1. Salk. 42.

ADMINISTRATORS are generally made of the nearest friend; or if there be more than one that have equal pretensions, they may, if the ordinary think fit, be all made administrators.

INTESTATE without kindred the king may dispose of the administration; but of right it belongs to the ordinary to dispose of to pious uses. 1. Salk. 39.

ADMINISTRATION granted the grandmother, the aunt moved for a *mandamus*. Holt. In equal degree the spiritual court has election, and the grandmother is as near as the aunt; and the grandmother has the advantage, for she is *in linea recta*. 1. Salk. 38.

HUSBAND dies intestate, administration may be granted to the next of kin, or to the wife (*ut antea*); but if wife dies, administration must be granted to the husband. Administration may be granted to the wife *quoad part*, and to the brother for the rest, but not of an entire thing, as a bond. 1. Salk. 36.

THE ordinary, after he has granted administration, cannot revoke it without cause.

ADMINISTRATOR becomes bankrupt, or *non compos*, it may be repealed; otherwise, if an executor becomes

bankrupt no administration shall be granted; but if *non compos*, administration may be granted.

ASSETS are also all those goods and chattels, actions and commodities which were the deceased's in right of action or possession as his own, and so continued to the time of his death; and which, after death, the executor or administrator gets into his hands as duly belonging to him in right of his executorship or administratorship; and these are assets in their hands to make them chargeable for so much to the creditors and legatees: and here observe,

1. THAT assets in one executor's hands is said to be assets in all their hands.

2. THAT assets in any part of the world are said to be assets in every part.

3. ALL goods and chattels of what nature soever that are valuable, shall be esteemed assets.

4. ALL goods or chattels in action or possibility at the deceased's death, if they come into the executors or administrators hands, shall be esteemed assets, if recovered in right of the deceased.

PROBATE of a testament is producing it before an ecclesiastical court and judge who has power to take the same; and this is done either by oath of the executor himself, or by witness or other process to confirm the same.

THE ordinary cannot insist on security from executor.
1. Salk. 299.

EXECUTOR cannot sue before probate.

IF executor delays probate, the ordinary, by process, may compel him to come in, and either to accept or refuse the executorship.

MANDAMUS issued to grant probate, though the ordinary returned the party an absconding person, for the testator has trusted him first. 1. Salk. 299.

BUT

BUT thus much shall suffice for testaments and devises.

USES.

A USE is the profit or benefit of lands or tenements, or the equity and honesty to hold the land *in conscientia boni viri*.

A USE is either,

1. EXPRESS; as a feoffment to *J. S. to the use of W. S.* their heirs, &c. or,

2. IMPLIED; as if a fine be levied, a recovery suffered, or a feoffment made, without any consideration or declaration of the use, it then results to the conusor, recoverer, or feoffor, by an implication of law.

A USE is also *in esse*.

1. As in possession, reversion, or remainder.

OR, in *posse*,

1. As a limitation of a use to one for life, remainder to the use of his first son that shall be.

A USE at common law was but a mere confidence or trust, collateral to and distinct from the land annexed in privity to the estate, and to the person touching the land, and had two inseparable incidents, viz.

1. CONFIDENCE in the person, and

2. PRIVACY in the estate.

USES were first introduced when men knew their own property from that of another; for then they had two things, a possession of the land and a power to take the profits; the latter of which, when separated from the former, was the *use*. By reason of uses, men were enabled to dispose of their lands by will; and they were first turned into abuse during the wars between the houses of York and Lancaster¹. Uses served to defraud people of their just and reasonable rights, as appears by the several statutes respecting them.

¹ *Vide Sand. on Uses, 8. to 26. as to their origin and causes of introduction.*

To remedy these mischiefs the statute 27. H. 8. c. 10. was enacted, which transfers the possession to the use; and in the construction of this statute four things are requisite:

1. THAT there be a person seised.
2. THAT there be a *cestui que use in esse*.
3. THAT there be a use *in esse*, in possession or reversion.
4. THAT the estate out of which the uses do arise be vested in *cestui que use*: and uses which have not these four requisites are still merely trusts in equity.

To make a good use within the statute, care must be had,

1st. IN respect to the raising and creating it.

AND uses are raised either by transmutation of the estate, by feoffment, fine, or recovery: or,

OUT of the estate of the owner; as, by bargain and sale, or covenant to stand seised: and,

IT may be raised out of a lease *for life*²: and,

By parol without deed in writing: or,

By a *devise* to one to the use of J. S.

2d. IN respect to the persons trusted.

NEITHER the king nor any body corporate, aliens born, nor persons attainted, can be seised to uses; and the same law is with respect to disseisors, abators, intrudors, lords of villages, &c.

3d. IN respect to *cestui que use*.

AND persons who are capable of taking an estate in the land, are capable of taking the same by way of use.

4th. IN respect to the estate and possession of the person who creates the use; and therefore,

A COVENANT to stand seised, or bargain and sale in fee by tenant in tail only, passes a descendible freehold during the life of the tenant in tail;

AND a termor for years cannot create a use out of his term, so as to be executed by the statute 27. H. 8. c. 10⁴.

5th. IN respect of the estate and possession of him that doth take by the conveyance; and therefore,

A TE-

² *Contra* before the stat. and *vide* Sand. 59. 140.

⁴ Whether a term for years is within stat. 1. R. 3. *Vide* Sand. 42. 107.

A TENANT in fee or for life may stand seised to uses, but upon a gift in tail to the use of another the use is void.

A USE could not arise out of the estate of *cestui que use*, nor out of the estate of a lessee for years.

6th. IN respect to the consideration.

ON fines, recoveries and feoffments, there must be either a consideration or declaration.

ON bargains and sales, and covenants to stand seised, the *consideration* is absolutely necessary.

USES may be averred.

AND when the deed is inrolled, it shall take effect as from the beginning by relation; to avoid all intervenient estates and charges whatsoever.

THE consideration of kindred blood or marriage will raise uses on a covenant to stand seised.

COVENANT in consideration of money will not raise a use without inrolment.

7th. IN respect to the words used in raising uses.

IF one *bargain and sell* to his son, no use will arise unless money be paid and the deed inrolled.

So if, in consideration of money, one grants land to his son by the word *enfeoff*, no use will arise till *livery* is made.

8th. IN respect of the nature and quality of the use.

LANDS may be given to *charitable* uses, but not to *superstitious* uses.

DECLARATION of uses.

1. USES may be declared on a fine, feoffment, or recovery, but not on a bargain or sale, or covenant to stand seised.

2. EVERY one may declare the use according to the estate which he hath in the lands.

THEREFORE if husband seised *jure uxoris*, and his wife

5 Whether a tenant in tail or for life might have stood seised to a use before the stat. Sand. 59. ? or, Whether since the stat. *ibid.* 143. to 154.

wife levy a fine, the husband alone may declare the uses, but not if she dissent to such declaration.

JOINT-TENANTS may each declare the use according to his estate.

IF an infant, or a man of *non sanæ memoriæ*, declare the use of a fine, it shall bind him so long as the fine continues in force.

3. USES may be declared by deed indented, or by deed poll.

4. USES may be declared before or after the making of the assurance.

AND where the declaration of the use is precedent to the indenture, which is afterwards made accordingly, there no averment can be taken.

BUT where the declaration of the use is subsequent to the assurance, there an averment may be taken.

5. WHERE the limitation of the use is precedent, it is but directory, and doth not bind the estate until the assurance is made.

6. THE declaration of uses must be certain,

1st. IN the persons to whom,

2d. IN the lands of which,

3d. AND in the estates by which the uses are declared.

7. IF a fine is levied, or recovery suffered, pursuant to a precedent declaration of the uses, and such declaration is not pursued in the circumstances of time, person, quantity, or the like, then an averment without writing may be taken.

AVERMENT of uses.

WHERE any use is expressed upon a charter of feoffment, no other use can be averred.

BUT on fines and recoveries, when no uses are expressed, other uses may be averred besides those, which the law would imply.

OF uses by construction of law.

IF a fine be levied; recovery suffered, or feoffment made, without any consideration or declaration of the use; the use, by construction of law, will be in the conuſor, reuerſee, or feoffor.

IF a man make a feoffment to the intent to perform his laſt will, &c. the use ſhall be in the feoffor and his heirs, while he lives to diſpoſe of it.

IF a feoffment be made to J. S. and his heirs, to the use of W. for twenty years, the residue of the use after the twenty years, will reſult to the feoffor and his heirs.

AND the use will reſult according to the eſtate which the parties had in the land; as if two joint-tenants, the one in fee-ſimple, the other for life, levy a fine without any consideration or declaration of the use, the use will reſult to the one in fee, and to the other for life; *Et ſic de ſimilibus.*

THE limitation of uses ſhall be according to the rules of the common law.

THE extinguishment of uses.

CONTINGENT uses may be extinguished or ſuſpended by a feoffment.

AND when the eſtate out of which the uses do ariſe is gone, the uses are alſo gone.

REVOCATION of uses.

PROVISOS and powers of revocation of uses are frequent in voluntary conveyances to uses.

BUT in caſe of a feoffment, or other conveyance, whereby the feoffee or grantee is in by the common law, as where A. enfeoffs B. and his heirs to the use of B. and his heirs, a power of revocation reſerved upon ſuch a feoffment is void.

REVOCATIONS are favourably interpreted; and therefore a perſon may revoke part at one time and part at another.

NEW uses may be limited by the ſame conveyance by which the old uses are revoked.

ALL the requisites contained in the proviso (such as sealing, subscription of names, witnesses, &c.), must be punctually observed in the revocation.

WHEN a covenantor makes void uses by virtue of a power of revocation, he is seised of the fee-simple without entry or claim.

POWERS of revocation may be extinguished by a fine or feoffment.

POWERS may also be destroyed by a release by the person to whom the power is reserved, to one who has an estate of freehold in the lands in possession, reversion, or remainder; or they may be destroyed by a disclaimer.

TRUSTS not executed by the statute.

As a conveyance in trust to convey, &c.

MONEY delivered to a friend in trust to purchase lands, to the end that he may have the profits, &c.

A PURCHASE of lands in the names of the purchaser and *A. B.* and their heirs (to prevent dower); but as to the estate of *A. B.* and his heirs in trust for the purchaser.

A GRANT of leases for years, or goods and chattels, in trust for the grantor.

An obligation or statute made to *A. B.* to the use of *C. D.*

* The Law of Uses is much illustrated by the Notes added by the Editor of *The Touchstone of Common Assurances*; as also by the very elaborate Opinion of Mr. BOOTH, which he has inserted under the Chapter of Uses at the end of that work; and which, with some additional learning on that subject, is also extant in our former volume, page 421. The Law of Uses and Trusts is also more fully treated of in a late publication, which is occasionally quoted in the margin of the present Treatise, entitled, *Essay on the Nature and Laws of Uses and Trusts*, by F. W. SANDERS, Esq.



[1]

A

R E G I S T E R

O F

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REPORTS.

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REPORTS.

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“ in

“ in a work of this nature. The principal object of the
 “ present Editor, therefore, has been to obviate this objection,
 “ by throwing that part of the work, so far as it is retained,
 “ into a form that may render its contents of more easy
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“ The consequence of thus reducing the theoretical part of
 “ the original work will be, the making considerable room
 “ for the insertion of such useful precedents as the practical
 “ part of the work is at present deficient in; the object of the
 “ Editor being to keep in sight the principal end to be answered
 “ by this kind of collection, variety and general utility;
 “ in which view none of the original precedents will be
 “ omitted, but such as are inadequate to, or improper for
 “ the conveyance of the property intended to be transferred
 “ by them.

“ In the course of the work, the Editor means to furnish
 “ such Notes as may tend to explain and illustrate both the
 “ theoretical and practical parts, by pointing out the general
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On the Subject of the Paper inserted in our last Number entitled THE OPTION, which contains much curious Learning on a Topic peculiarly interesting to some of our Readers, we have received Information that an Answer, drawn up by an eminent Counsel of that Day, was printed, though not made public; we shall therefore feel ourselves much indebted to any of our Correspondents who can point out where that Piece may be met with.

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